113-452

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 154.

EDWARD B. CHASE, PLAINTIFF IN ERROR,

vs.

ABIJAH CURTIS AND HENRY DE COPPET.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 10, 1881.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between Edward B. Chase, plaintiff, against Elijah Curtis and H. DeCoppet, defendants, a manifest error hath happened, to the great damage of the said Edward B. Chase, plaintiff, as is said and as appears by his complaint, we being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said Justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this nineteenth day of September, in the year of our Lord one thousand eight hundred and eighty-one, and of the Independence of the United States the one hundred and sixth.

[SEAL.] J. M. DEUEL,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

The foregoing writ is allowed. Sept. 19th, 1881.
SAMUEL BLATCHFORD.

2 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, Joseph M. Deuel, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to fifty-six, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Edward B. Chase, plaintiff in error, against Abijah Curtis and H. DeCoppet, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this tenth day of October, in the year of our Lord one thousand eight hundred and eighty-one,

and of the Independence of the United States the one hundred and sixth.

[SEAL.] JOSEPH M. DEUEL, *Clerk.*

[Endorsed:] U. S. Supreme Ct. Edward B. Chase *vs.* Abijah Curtis & H. DeCoppet. Writ of error. Due and timely service of the within writ of error is hereby admitted. Sept. 20th, 1881. Porter, Lowrey, Soren & Stone, att'ys for def'ts, Chase & de Coppett. U. S. circuit court. Filed Sep. 21, 1881. Joseph M. Deuel, clerk.

3 United States Circuit Court for the Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE, Plaintiffs,
against
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustee of the Union Petroleum Company of New York, in the years 1874 and '75.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff- attorney- within twenty days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 21st day of December, in the year one thousand eight hundred and seventy-seven.

[L. S.] JOHN I. DAVENPORT, *Clerk.*

SCUDDER & CARTER,
Plaintiffs' Attorneys. Office and post office address, 66 Wall St., P. O. Box 3591, New York City.

4 [Endorsed:] United States circuit court, southern district of New York. Joseph L. Chase and Susan J. Clark *vs.* Abijah Curtiss, H. DeCoppet & ano. Summons. Scudder & Carter, plaintiffs' attorneys. To the defendant- within named: Take notice that upon default judgment will be taken for the sum of 40,828.97 dollars in money, with interest on 40,500$\frac{00}{100}$ from the thirtieth day of July, 1874, besides costs, and on 8328.97 from the third day of October, 1874. Scudder & Carter, plaintiffs' attorneys, 66 Wall St., N. Y. city. U. S. circuit court. Filed Dec. 28, 1877. John I. Davenport, clerk. United States of America, southern district of New York, *ss:* I hereby certify that on the 26th day of December, 1877, at the city of New York, I personally served the within summons on the within-named defendants, Abijah Curtis & H. DeCoppet, by showing to each of them the same and delivering to and leaving with each of them a true copy thereof Dec. 28, 1877. Louis F. Payn, U. S. marshal. By Geo. H. Holmes, deputy.

5 U. S. Circuit Court, Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE
against
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiff, sued as trustee of the Union Petroleum Company of New York, in the years 1874 and '75.

SIR: Please take notice that we are retained by and hereby appear as attorneys for the defendants, Abjah Curtis and H. DeCoppet, in the above-entitled action, and the clerk of the United States circuit court for the southern district of New York will please enter our appearance accordingly.

Dated New York, January 11th, 1878.

Yours, &c.

PORTER, LOWRY, SOREN & STONE,

6 *Attorneys for Defendants, Abijah Curtis & H. DeCoppet,*
Office No. 3 Broad Street. Post Office Address,
Box 1836, New York City.

To the Clerk of the U. S. Circuit Court, for the Southern District of New York.

Endorsed: U. S. circuit court, southern dist. of New York. Joseph L. Chase and Susan J. Chase ag'st Abijah Curtis, H. DeCoppet, *et al.* Notice of appearance. Porter, Lowry, Soren & Stone, attorney for defendants Abijah Curtis & H. DeCoppet, No. 3 Broad street, New York city. To the clerk of the U. S. circuit court for the southern district of New York. U. S. circuit court. Filed Jan. 11, 1878. John I. Davenport, clerk.

7 United States Circuit Court for the Southern District of New York.

JOSEPH C. CHASE and SUSAN J. CHASE, Plaintiffs,
against
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustee of the Union Petroleum Company of New York, in the years 1874 and 1875, Defendants.

The plaintiffs, by Scudder and Carter, their attorneys, complaining of the defendants above named, allege, on information and belief—

First. That the plaintiffs are citizens of and residents of the State of Pennsylvania, and the defendants are citizens of and residents of the State of New York.

8 Second. That at the times hereinafter mentioned the defendants were trustees of the Union Petroleum Company of New York.

Third. That the said company is, and at the times hereinafter mentioned was, a corporation organized pursuant to an act of the Legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or

chemical purposes," passed on the 17th day of February, 1848, and the amendments thereto, its principal place of business being in the city of New York.

Fourth. That the said plaintiffs were, prior to and at the time of commencing the action hereinafter mentioned, lawfully seized in fee of certain incorporeal hereditaments, to wit, the exclusive right and privilege of digging and boring for salt, oil, and minerals upon certain lots, parts or parcels of a certain tract of land known as the John McClintock farm, situate in the township of Cornplanter, county of Venango, State of Pennsylvania, and to take and carry away the same.

And that the said Union Petroleum Company of New York, well knowing that the said plaintiffs were lawfully seized in fee of the said incorporeal hereditaments, did unlawfully and against the will of said plaintiffs enter upon said lots, parts, or parcels of the said tract of land, and into certain oil wells which the said plaintiffs had thereon, and removed and expelled the said plaintiffs therefrom, and from their rights and privileges thereon, and wrongfully took and collected large quantities of oil therefrom, whereby these plaintiffs suffered great damage; that thereafter, and on or about the 15th day of December, 1872, an action was brought by the above-named plaintiffs for the unlawful acts aforesaid against the said Union Petroleum Company of New York, in the court of common pleas for the county of Venango, in the State of Pennsylvania, in which action the said Union Petroleum Company duly appeared, and that the said action was thereafter, and on or about the 9th day of September, 1873, on the petition of the said Union Petroleum Company, which said petition was verified by the affidavit of Abijah Curtiss, one of the defendants above-named, removed to the United States circuit court for the western district of Pennsylvania. And that on the 30th day of July, 1874, and before the time for filing the annual report hereinafter mentioned, the above-named plaintiffs duly recovered a judgment in the said action for the wrongful acts aforesaid against the said Union Petroleum Company of New York in the circuit court of the United States in and for the western district of Pennsylvania by the judgment and consideration of said court having jurisdiction therein, and of the said Union Petroleum Company of New York for forty thousand five hundred dollars ($40,500.00) damages, and three hundred and twenty-eight dollars and ninety-seven cents ($328.97) costs, which judgment was duly given, and still remains, in full force and effect, not satisfied or annulled, and no part thereof has been paid.

Fifth. That the said Union Petroleum Company of New York did not, within twenty (20) days from the first day of January, 1875, make and publish a report as required by law in such case made and provided, signed by its president and a majority of its trustees, and verified by the oath of the president or secretary thereof, and did not file the same in the office of the clerk of the county court, where the business of the company was carried on, to wit, the county of New York; nor have they made,

published, signed, verified, or filed any such report whatsoever as by law required, but have wholly failed so to do.

Wherefore the plaintiffs demand judgment against the above-named defendants in the sum of $40,828.97, with interest on $40,500.00 from the 30th day of July, 1874, and on $328.97 from the 3rd day of October, 1874, besides the costs and disbursements of this action.

SCUDDER & CARTER,
Plaintiffs' Att'ys, 66 Wall St., N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss:*

13 George A. Black, being duly sworn, says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. And deponent further says that the reason this verification is not made by one of the plaintiffs herein is that they do not reside within the city and county of New York, and that deponent's grounds of belief are letters from the attorneys of the plaintiffs and the inspection of certified copies of the judgment record of the United States circuit court for the western district of Pennsylvania, which copies are now in deponent's possession, and the certificates of the clerk of the city and county of New York.

14 (Signed) GEO. A. BLACK.

Sworn to before me, this 8th day of February, 1878.
[SEAL.] (S'g'd) FRANCIS R. APPLETON,
Notary Public, N. Y. Co.

(Endorsed:) U. S. circuit court. Joseph L. Chase and Susan J. Chase *vs.* Abijah Curtiss, H. DeCoppet & ano. Complaint. Scudder & Carter, att'ys for pl'ffs, 66 Wall St., N. Y. city. U. S. circuit court. Filed Feb. 9, 1878. John I. Davenport, clerk.

15 At a stated term of the United States circuit court for the southern district of New York, held at the rooms thereof, in the post office building in the city of New York, on the 30th day of November, 1878.

Present: Hon. Samuel Blatchford, circuit judge.

JOSEPH L. CHASE AND SUSAN J. CHASE
against
ABIJAH CURTISS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.

On reading and filing the plaintiffs' notice of motion to make the complaint herein more definite and certain, and for
16 other relief, dated February 15, 1878, and upon the complaint and all proceedings in this action, after hearing Mr. Hamlin

for the defendants, Chase and DeCoppet, in support of the motion, and Mr. Black for the plaintiffs, opposed—

Now, on motion of Porter, Lowrey, Soren and Stone, attorneys for said defendants, it is ordered that the complaint herein be made more definite and certain by describing by metes and bounds, or otherwise, in such manner as shall specifically indicate and distinguish them, the lots, pieces, or parcels of land on which it is alleged that the plaintiffs had the exclusive right and privilege of boring for salt, oil, and minerals, and upon which it is alleged the defendants committed the wrongful acts referred to; and also by setting forth the specific
17 times at which the plaintiffs allege they were seized of the said incorporeal hereditaments and the specific dates of the wrongful acts of the said company alleged in the complaint, to wit, the entering upon said tracts of land, and into the said alleged oil wells, and removing and expelling the plaintiffs therefrom, and collecting large quantities of oil therefrom, and also the amount and nature of the damage alleged to have been suffered by the plaintiffs.

And that the plaintiffs furnish to the defendants a bill of particulars of the specific quantities of oil alleged to have been taken and collected by the said company, and the dates when and the particular tracts and wells from which the same are respectively alleged to have been taken.

And that the plaintiffs serve upon the attorneys for the said defendants an amended complaint, made definite and certain as above directed, and also such bill of particulars, within twenty days
18 from the service of this order, upon the attorneys for the plaintiff; but this order is made without passing upon the admissibility or effect of the judgment alleged in the complaint as evidence against the defendants, and with leave to the plaintiffs, should they so elect, within said twenty days, to amend their complaint by alleging said judgment alone as their cause of action, and striking out all allegations except those setting up said judgment as a cause of action, in which event the said motions of the defendants are denied.

And it it is further ordered that in default of service by the plaintiffs within said twenty days of a complaint made definite and certain, as above directed, or at the election of plaintiffs, otherwise amended as above provided, the complaint of the plaintiffs herein be stricken out.

And it is further ordered that within twenty days from the
19 service of this order the plaintiffs file security for costs in the sum of two hundred and fifty dollars, with two sufficient sureties.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) United States circuit court, southern district of New York. Joseph L. Chase *vs.* Abijah Curtiss and an'or, sued as trustees, etc. Order. Porter, Lowrey, Soren & Stone, att'ys def'ts, Chase & DeCoppet, 3 Broad St., N. Y.

(Further endorsed:) "Let Mr. Black consent to this form. (S'g'd)

S. B." U. S. circuit court. Filed Nov. 30th, 1878. John I. Davenport, clerk.

20 At a stated term of the circuit court of the United States for the southern district of New York, held at the court-rooms, in the post office building, in the city of New York, on the —— day of December, 1878.

Present: Hon. Samuel Blatchford, judge.

JOSEPH L. CHASE and SUSAN J. CHASE
against
ABIJAH CURTISS, H. DECOPPET, and JOHN DOE, whose real name is unknown, as trustees, etc.

On reading the annexed consent, and on motion of Scudder & Carter, attorneys for the plaintiffs herein, it is ordered that the plaintiffs have leave to deposit the sum of two hundred and fifty dollars with the United States Trust Company to the credit of this action, as security costs thereof, and that the said deposit, when made

21 and evidenced by the service of a certificate thereof, have the like force and effect as though the plaintiffs gave a bond for the security for costs in this action, said deposit not [to] be withdrawn without an order of this court, upon notice to the attorneys of the respective parties, or by consent.

(Signed) SAM'L BLATCHFORD.

We consent to the entry of the foregoing order.

(Signed) PORTER, LOWREY, SOREN & STONE,
Att'ys for Def't-, Curtis & DeCoppett.

(Endorsed:) United States circuit court, southern dist. of N. Y. Joseph L. Chase *et als. ag'st* Abijah Curtis *et al.* Order on consent. Scudder & Carter, pl'ffs' att'ys, No. 66 Wall St., N. Y. U. S. circuit court. Filed Dec 21, 1878. John I. Davenport, clerk.

22 United States Circuit Court for the Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE, Plaintiffs,
vs.
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustees of the Union Petroleum Company, of New York, in the years 1874 and 1875, Defendants.

The plaintiffs, by Scudder and Carter, their attorneys, by their amended complaint allege, on information and belief:

First. That the plaintiffs are citizens of and residents of the State of Pennsylvania, and the defendants are citizens and residents of the State of New York.

23 *Second.* That at the times hereinafter mentioned the defendants were trustees of the Union Petroleum Company of New York.

Third. That the said company is, and at the times hereinafter mentioned was, a corporation organized pursuant to an act of the

Legislature of the State of New York, entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes," passed on the 17th day of February, 1848, and the amendments thereto, its principal place of business being in the city of New York.

Fourth. That the said plaintiffs brought their plea of trespass on the case against the said Union Petroleum Company of New York in the court of common pleas for the county of Venango, in the State of Pensylvania, in which the said Union Petroleum Company duly appeared, and that the said action was thereafter and on or about the 9th day of September, 1873, on the petition of the said Union Petroleum Company, verified by the affidavit of Abijah Curtis, one of the defendants above named, removed to the United States circuit court for the western district of Pennsylvania. And that on the 30th day of July, 1874, and before the time for filing the annual report hereinafter mentioned, the above-named plaintiffs duly recovered a judgment in the said action against the said Union Petroleum Company of New York in the circuit court of the United States in and for the western district of Pennsylvania, by the judgment and consideration of said court having jurisdiction therein, and of the said Union and Petrolum Company of New York, for forty thousand five hundred dollars ($40,500.00) damages, and three hundred and twenty-eight dollars and ninety-seven cents ($328.97) costs, which judgment was duly given and still remains in full force and effect, not satisfied or annulled, and no part thereof has been paid.

24 *Fifth.* That the said Union Petroleum Company of New York did not within twenty (20) days from the first day of January, 1875, make and publish a report as required by law in such case made and provided, signed by its president and a majority of its trustees, and verified by the oaths of the president or secretary thereof, and did not file the same in the office of the clerk of the county where the business of the company was carried on, to wit, the county of New York; nor have they made, published, signed, verified, or filed any such report whatsoever as by law required, but have wholly failed so to do.

Wherefore the plaintiffs demand judgment against the above-named defendants in the sum of $40,828.97, with interest on $40,500.00 from the 30th day of July, 1874, and on $328.97 from the 3d day of October, 1874, besides the costs and disbursements of this action.

SCUDDER & CARTER,
Plaintiffs' Attorneys, 66 Wall street, N. Y. City.

CITY AND COUNTY OF NEW YORK, *ss.:*

George *N.* Black, being duly sworn says: That he is one of the attorneys for the plaintiffs in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. And deponent further says

that the reason this verification is not made by one of the plaintiffs herein is that they do not reside within the city and county of New York, and that deponent's grounds of belief are letters from the attorneys of the plaintiffs, and the inspection of certified copies of the judgment record of the United States circuit court for
25 the western district of Pennsylvania, which copies are now in in deponent's possession, and the certificate of the clerk of the city and county of New York.

GEO. A. BLACK.

Sworn to before me, this 16th day of December, 1878.

[SEAL.] LEWIS CASS LEDYARD,
Notary Public, N. Y. Co.

26 U. S. Circuit Court, Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE
vs.
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.

The defendant, Abijah Curtis, demurs to the complaint herein for the ground—

That it appears upon the face of the complaint that it does not state facts sufficient to constitute a cause of action.

PORTER, LOWREY, SOREN & STONE,
Attorneys for Def't, No. 3 Broad Street, New York City.

I hereby certify that in my opinion the above demurrer of the defendant, Abijah Curtis, is well founded in point of law.

G. P. LOWREY,
Of Counsel.

Endorsed: U. S. circuit court. Joseph L. Chase *et al. ag'st* Abijah Curtis *et al.* Demurrer of def't Abijah Curtis. Porter, Lowrey, Soren & Stone, attorneys for def't Abijah Curtis, No. 3 Broad Street, New York city. U. S. circuit court. Filed Jan. 18, 1879. John I. Davenport, clerk.

27 U. S. Circuit Court, Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE
vs.
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiffs, sued as trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.

The defendant, H. DeCoppet, demurs to the complaint herein for the ground—

That it appears upon the face of the complaint that as to him, said defendant, it does not state facts sufficient to constitute a cause action.

PORTER, LOWREY, SOREN & STONE,
Att'ys for said Defendants, No. 3 Broad Street, New York City.

I hereby certify that in my opinion the above demurrer of the defendant, H. De Coppet, is well founded in point of law.

G. P. LOWREY,
Of Counsel for Def't, H. DeCoppet.

Endorsed: U. S. circuit court. Joseph L. Chase *et al. ag'st* Abijah Curtis *et al.* Demurrer of def't H. DeCoppet. Porter, Lowrey, Soren & Stone, attorneys for def't H. DeCoppet, No. 3 Broad Street, New York city. U. S. circuit court. Filed Jan. 18, 1879. John I. Davenport, clerk.

28 U. S. Circuit Court.

JOSEPH L. CHASE *et al. vs.* ABIJAH CURTIS *et al.*

We consent that Edward B. Chase be substituted as plaintiff herein upon the filing in this court of the annexed certificates of the register of the probate of wills, and granting of letters of administration in and for the county of Crawford, in the Commonwealth of Pennsylvania, showing the grant of letters testamentary on the will of Joseph L. Chase, dec'd, to George A. Chase and John H. Galzell, and of letters of administration of the estate of Susan J. Chase, dec'd. to George A. Chase, and on the filing in this court of the annexed assignment, executed by the said representatives of said deceased persons, of the cause of action herein to said Edward B. Chase, and that thereafter this action be continued in the name of
29 said Edward B. Chase as plaintiff, the monies heretofore deposited as security for costs by the plaintiffs to remain such security, and upon the same conditions as heretofore provided, and that an order to that effect be entered.

New York, November 14, 1879.

(Signed) PORTER, LOWERY, SOREN & STONE,
Att'ys for Def'ts, Chase & DeCoppet.

30 In consideration of the sum of one dollar to us in hand paid by Edward B. Chase, of the city of Titusville, Crawford county, Pennsylvania, we, George A. Chase and John H. Dalzell, as the executors of the last will and testament of Joseph L. Chase, deceased, duly appointed by the register and recorder of the county of Crawford, in the Commonwealth of Pennsylvania, on the first (1st) day of October, 1879, and I, the said George A. Chase, as administrator of the goods, chattels, and credits which were of Susan J. Chase, deceased, duly appointed by the register and recorder of Crawford county aforesaid, have sold and assigned, and by these presents do sell and transfer, unto the said Edward B. Chase all the right, title, and interest which they, the said Joseph L. Chase and Susan J. Chase, and each of them, had at the time of their respective deaths
31 in and to that certain judgment recovered by them in the United States circuit court for the western district of Pennsylvania in a certain action therein, wherein they, the said Joseph L. Chase and Susan J. Chase were plaintiffs and the Union Petroleum Company of New York were defendants, for the sum of forty thousand five hundred dollars damages and three hundred and twenty-

eight $\frac{87}{100}$ dollars costs, duly given in said court on or about the 30th day of July, A. D. 1874, and also all their, the said deceased's, interest in and title to the cause of action, claim, and demand against Abijah Curtis, H. DeCoppet, and John Doe, sued as trustees of the said Union Petroleum Company of New York, in a certain action brought by the said deceased in the United States circuit court for the southern District of New York against them, the said Curtiss, DeCoppet, and John Doe, and hereby authorize and empower
32 the said Edward B. Chase to prosecute the said action as substituted plaintiff, or to revive and continue the same in such form as the said court may direct.

In witness whereof, we have hereunto set our hands, this eighth day of October, 1879.

(Signed) GEORGE A. CHASE,
Adm'r of Estate of Susan J. Chase.

(S'g'd) GEORGE A. CHASE,
(S'g'd) JOHN H. DALZELL,
Executors of the Last Will and Testament of Joseph L. Chase, deceased.

Executed in presence of—
(S'g'd) JOS. T. CHASE.

33 STATE OF PENNSYLVANIA, } ss:
Crawford County, }

I, Pearson Church, president judge of the 30th judicial district, consisting of the county of Crawford, do certify that Rob't Andrews, whose name appears to the above and foregoing certificate, is the register of wills, &c., of the county of Crawford, Pa., and the seal by him thereto affixed is the seal of said office, and also that his attestation of the said record is in due form.

Witness my hand and seal, this 3rd day of October, 1879.

(Signed) PEARSON CHURCH. [L. S.]
President Judge.

34 STATE OF PENNSYLVANIA, } ss:
Crawford County, }

I, Wm S. Rose, prothonotary of the court of common pleas in and for said county, do certify that the Hon. Pearson Church is now, and was at the time of signing the above certificate, president judge of the 30th judicial district of said Commonwealth, consisting of the county of Crawford, duly commissioned and qualified according to law, and that his signature to the said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Meadville, this 3rd day of October, A. D. 1879.

[SEAL.] (Signed) WM S. ROSE,
Prothonotary.

35 STATE OF PENNSYLVANIA, } ss:
County of Crawford, }

I, Robert Andrews, register for the probate of wills and granting

letters of administration in and for the county of Crawford, do hereby certify that among the rolls and records of my office it appears as follows: Joseph L. Chase, late of the city of Titusville, in said county, died on Wednesday, April 23rd, 1879, at or about 2 o'clock a. m.; that on the first day of October, A. D. 1879, the last will and testament of the said Joseph L. Chase was duly proved, approved, and registered; that on the same day letters testamentary thereon were, in due form of law, granted and issued to George A. Chase and John H. Dalzell, the executors in said will named.

In testimony whereof, I have hereunto set my hand and
36 affixed my official seal, at the city of Meadville, Pa., this 3rd day of October, A. D. 1879.

[SEAL.] (S'g'd) ROB'T ANDREWS, *Register.*

STATE OF PENNSYLVANIA, } ss:
Crawford County, }

I, Pearson Church, president judge of the 30th judicial district, consisting of the county of Crawford, do certify that Rob't Andrews, whose name appears to the above and foregoing certificate, is the register of wills, &c., of the county of Crawford, Pa., and the seal by him thereto affixed is the seal of said office, and also that his attestation of the said record is in due form.

Witness my hand and seal, this 3rd day of Oct., 1879.

(Signed) PEARSON CHURCH, [L. S.]
President Judge.

37 STATE OF PENNSYLVANIA, } ss:
Crawford County, }

I, Wm S. Rose, prothonotary of the court of common pleas in and for said county, do certify that the Hon. Pearson Church is now, and was at the time of signing the above certificate, president judge of the 30th judicial district of said Commonwealth consisting of the county of Crawford, duly commissioned and qualified according to law, and that his signature to the said certificate is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Meadville, this 3rd day of October, A. D. 1879.

[SEAL.] (Signed) WM S. ROSE, *Prothonotary.*

38 STATE OF PENNSYLVANIA, } ss:
County of Crawford, }

I, Robert Andrews, register for the probate of wills and granting letters of administration, in and for said county, do hereby certify that among the rolls and records of my office it appears as follows:

Susan J. Chase, late of Titusville, died on Monday, the 17th day of December, 1877, at or about 12 o'clock noon; that on the 5th day of January, A. D., 1878, the renunciation of Joseph L. Chase, husband of deceased, and other heirs, of their right under the law to administer, filed, and letters of administration on the estate of Susan J. Chase, dec'd, were, in due form of law, granted and issued to George A. Chase, he giving bonds in the sum of two thousand dollars, with Joseph L. Chase and Edward B. Chase as sureties.

39 In testimony whereof, I have hereunto set my hand and affixed my official seal, at Meadville, Pa., this 3rd day of October A. D. 1879.

[SEAL.] (Signed) ROB'T ANDREWS, *Register*.

(Endorsed:) U. S. circuit court. Chase *ag'st* Curtis. Consent &c., to continue action. Scudder & Carter, pl'ffs att'ys, 66 Wall St. U. S. circuit court. Filed Nov. 28, 1879. John I. Davenport, clerk.

40 At a stated term of the circuit court of the United States for the southern district of New York, in the second circuit, held at the United States post office building, in the city of New York, on the 28th day of November, 1879.

Present: Hon. Samuel Blatchford, circuit judge.

JOSEPH L. CHASE *et al. vs.* ABIJAH CURTISS *et al.*

Upon reading and filing the annexed consent, together with the certificates and assignment therein mentioned, and on motion of Scudden & Carter, attorneys for the plaintiff, it is ordered that Edward B. Chase be, and he hereby is, substituted as party
41 plaintiff herein, and that this action be continued in his name as such plaintiff, and that the moneys heretofore deposited as security for costs by the plaintiff above-named, remain as such security, and upon the same conditions as heretofore provided.

(Signed) SAM'L BLATCHFORD.

(Endorsed:) U. S. circuit court, S. D. of N. Y. Joseph L. Chase *et al.* ag'st Abijah Curtis *et al.* Order of revivor. Scudder & Carter, plaintiffs' attorneys, 66 Wall street, New York. U. S. circuit court. Filed Nov. 28, 1879. John I. Davenport, clerk.

42 Circuit Court of the United States for the Southern District of New York.

JOSEPH L. CHASE and SUSAN J. CHASE
vs.
ABIJAH CURTIS and others.

BLATCHFORD, J.: On the authority of the case of Miller *v.* White (50 N. Y., 137) the demurrers in this case must be sustained, with costs to each demurrant, with leave to the plaintiffs to amend in 20 days, on payment of costs.

(Endorsed:) Circuit court of the United States for the southern district of New York. Joseph L. Chase and Susan J. Chase *vs.* Abijah Curtis and others. Decision June 1st, 1880. U. S. circuit court. Filed June 1st, 1880. John I. Davenport, clerk.

43 At a stated term of the circuit court of the United States for the southern district of New York, held at the United

States court-rooms, in the city of New York, on the — day of October, 1880.

Present: Hon. Samuel Blatchford, circuit judge.

EDWARD B. CHASE
against
ABIJAH CURTIS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiff, sued as trustees of the Union Petroleum Company, of New York, in the years 1874 and 1875.

The separate demurrers of the defendants, Abijah Curtis and H. DeCoppet, having come on regularly for argument before
44 this court on the 19th day of April, 1880, after hearing Mr. John K. Porter, of counsel for said defendants thereof, in support, and Mr. George A. Black, of counsel for the plaintiff, in opposition thereto, due deliberation being had, it is now, on motion of Messrs. Porter, Lowrey, Soren and Stone, attorney for the said defendants, ordered and adjudged that said demurrers be, and they are hereby, in all respects sustained respectively, with costs of each demurrer to said defendants respectively to be taxed, with leave to the plaintiff to amend on payment of said costs within twenty days after service of copy hereof, otherwise that the said defendants have judgment that the complaint herein be dismissed upon the merits with costs.

(Signed) SAM'L BLATCHFORD.

Form approved.

(Signed) SCUDDER & CARTER,
Pff's Att'ys.

45 (Endorsed:) U. S. circuit court, southern district of N. Y. Edward B. Chase *vs.* Abijah Curtis, H. DeCoppet *et al.*, etc. Order sustaining demurrers. Porter, Lowrey, Soren & Stone, def'ts' att'ys, 3 Broad St., N. Y.

(Endorsed:) "Give notice. S. B." U. S. circuit court. Filed. Oct. 9, 1880. Joseph M. Deuel, clerk.

46 At a stated term of the circuit court of the United States for the southern district of New York, held at the United States court-rooms, in the city of New York, on the 16th day of November, 1880.

Present: Hon. Samuel Blatchford, circuit judge.

EDWARD B. CHASE
against
ABIJAH CURTISS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiff, sued as trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.

The separate demurrers of the defendants, Abijah Curtiss and H. DeCoppet, having come on regularly for argument, and
47 having been argued before this court on the 19th day of April, 1880, and this court, upon due deliberation, having, by an order herein dated the 9th day of October, 1880, ordered and

adjudged that said demurrers be, and that they were thereby, in all respects sustained, respectively, with costs of such demurrer, to said defendants, respectively, to be taxed, with leave to the plaintiff to amend his complaint on payment of said costs within twenty days after service of a copy of said order; otherwise, that the said defendants have judgment, that the complaint herein be dismissed upon the merits, with costs; and a copy of said order having been served upon the plaintiff's attorneys on the 15th day of October, 1880, and more than twenty days having elapsed since such service, and the plaintiff having failed to amend his complaint as by said order allowed, as appears by the affidavit of George S. Hamlin,
48 sworn to the 8th day of November, 1880; Now, on motion of Porter, Lowrey, Soren & Stone, attorneys for the said defendants,

It is ordered that the complaint herein be, and the same is hereby, dismissed upon the merits, with costs to each of said defendants, to be taxed, and that said defendants have judgment accordingly.

(Signed) SAM'L. BLATCHFORD.

(Endorsed:) U. S. circuit court, southern district of New York. Edward B. Chase *vs.* Abijah Curtiss, H. DeCoppet *et al.* Order. Porter, Lowrey, Soren & Stone, att'ys def'ts Curtiss and DeCoppet, 3 Broad St., N. Y.

(Endorsed:) "Give notice. S. B." Form of within order approved. N. Y., Nov. 17, 1880. U. S. circuit court. Filed Nov. 19, 1880. Joseph M. Duel, clerk.

49 *Judgment. Nov.*, 1880.

Circuit Court of the United States for the Southern District of New York.

EDWARD B. CHASE
against
ABIJAH CURTISS, H. DECOPPET, and JOHN DOE, whose real name is unknown to plaintiff, sued as trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.

The separate demurrers of the defendants, Abijah Curtiss and H. DeCoppet, having come on regularly for argument, and having been argued before this court on the 19th day of April, 1880, and this court, upon due deliberation, having, by an order herein, dated the 9th day of October, 1880, ordered and adjudged that said demurrers be, and that they were thereby, in all respects
50 sustained, respectively, with costs of each demurrer to said defendants respectively to be taxed, with leave to the plaintiff to amend his complaint on payment of said costs within twenty days after service of a copy of said order; otherwise, that the said defendants have judgment; that the complainant herein be dismissed upon the merits with costs; and a copy of said order having been served upon the plaintiff's attorneys on the 15th day of October, 1880, and more than twenty days having elapsed since such service,

and the plaintiff having failed to amend his complaint, as by said order allowed, and thereupon this court having ordered that the complaint herein be dismissed upon the merits with costs to each of said defendants, to be taxed, and that said defendants have
51 judgment accordingly; and the costs of the defendant, Abijah Curtis, having been taxed at the sum of thirty-six $\frac{51}{100}$ dollars, and the costs of the defendant, H. DeCoppet, having been taxed at the sum of twenty-five $\frac{43}{100}$ dollars: Now, on motion of Messrs. Porter, Lowrey, Soren and Stone, attorneys for the said defendants, it is ordered and adjudged that the complaint herein be, and the same is hereby, dismissed upon the merits, and that the defendant, Abijah Curtis, do recover of the plaintiff, Edward B. Chase, the said sum of thirty-six $\frac{51}{100}$ dollars, costs herein, and that the defendant, H. DeCoppet, do recover of the plaintiff, Edward B. Chase, the said sum of twenty-five $\frac{43}{100}$ dollars, costs herein.

Judgment signed Nov. 24, 1880.

(S'g'd) J. M. DEUEL, *Clerk.*

52 (Endorsed:) United States circuit court, southern district of New York. Edward B. Chase *vs.* Abijah Curtis, H. DeCoppet *et al.* Judgment. Porter, Lowrey, Soren & Stone, att'ys def'ts Curtiss & DeCoppet, 3 Broad St., N. Y. U. S. circuit court. Filed Nov. 24, 1880. Joseph M. Deuel, clerk.

53 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EDWARD B. CHASE *vs.* ABIJAH CURTIS and H. DECOPPET.

Know all men by these presents, that we, Edward B. Chase, principal, of Titusville, Crawford county, Pennsylvania, John H. Dalzell, and James W. Dalzell, of Pittsburgh, Allegheny county, Pennsylvania, sureties, are held and firmly bound unto the above-named defendants in the sum of five hundred (500) dollars, to be paid to the said defendants; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 31st day of August, in the year of our Lord one thousand eight hundred and eighty-one.

Whereas the above-named, Edward B. Chase has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named Edward B. Chase shall prosecute his writ of error to effect, and answer all costs if he fail to make his plea good, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

EDWARD B. CHASE. [L. S.]
JOHN H. DALZELL. [L. S.]
JAMES W. DALZELL. [L. S.]

Sealed and delivered, and taken and acknowledged, this 31st day of August, 1881, as to Edward B. Chase.

[L. S.]

GEORGE A. CHASE,
U. S. Commissioner.

Sealed and delivered, and taken and acknowledged, this Sept. 10, 1881, before me, as to John H. Dalzell and Jas. W. Dalzell.

[L. S.]

H. D. GAMBLE,
Clerk U. S. Cir. Court, West. Dist. of Pa.

54 UNITED STATES OF AMERICA, }
Southern District of New York, } *ss:*

John H. Dalzell, being duly sworn, did depose and say: That he is worth the sum of one thousand (1,000) dollars over and above all his just debts and liabilities.

JOHN H. DALZELL.

Sworn to, this 9th day of Sept., A. D. 1881, before me.

[L. S.]

H. D. GAMBLE,
Clerk U. S. Cir. Court, Western Dist. of Pa.

WESTERN DISTRICT OF PA., *ss:*

I, H. D. Gamble, clerk of the circuit court of the United States in and for the western district of Penn., do hereby certify that the sureties to the within bond are personally known to me, and that they are perfectly good and responsible for the payment of the same.

H. D. GAMBLE,
Clk U. S. C't C't, W. D. Pa.

[Endorsed:] U. S. circuit court. Edward B. Chase *vs.* Abijah Curtis & H. DeCoppet. Bond for damages and costs on writ of error to U. S. Supreme Court. ——, proctor. U. S. circuit court. Filed Sept. 19, 1881. Joseph M. Deuel, clerk.

55 UNITED STATES OF AMERICA, *ss:*

To Abijah Curtis and H. DeCoppet, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-one, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Edward B. Chase is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated September 19th, 1881.

SAM'L BLATCHFORD.

SCUDDER & CARTER,
Plaintiffs Att'ys.

56 [Endorsed:] U. S. Supreme Court. Edward B. Chase, plaintiff in error, against Abijah Curtis and H. DeCoppet, defendant in error. Citation. Scudder & Carter, pl'ff's att'ys. Due and timely service of the within citation is hereby admitted, Sept. 20th, 1881. Porter, Lowery, Soren & Stone, att'ys for def'ts, Chase & DeCoppet. U. S. circuit court. Filed Sept. 21, 1881. Joseph M. Deuel, clerk.

Endorsed on cover: S. New York C. C. U. S. No. 154. Edward B. Chase, plaintiff in error, *vs.* Abijah Curtis and Henry DeCoppet. Filed 10th November, 1881.

113-4V-2

SUPREME COURT OF THE UNITED STATES.

EDWARD B. CHASE,
Plaintiff in Error,

against

ABIJAH CURTIS and
HENRY DE COPPET.

No. 154.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY J. SCUDDER,
Attorney for Plaintiff in Error.

C. G. BURGOYNE, "QUICK" PRINT, 146, 148 & 150 CENTRE STREET, N. Y.

Supreme Court of the United States.

EDWARD B. CHASE,
Plaintiff in Error,

AGAINST

ABIJAH CURTIS and HENRY DE COPPET.

No. 154.

BRIEF

For Plaintiff in Error.

STATEMENT.

The writ of error in this case is taken from the judgment of the Circuit Court of the United States for the Southern District of New York, rendered upon the trial of an issue of law.

The amended complaint sets forth the citizenship of the parties, and the incorporation of the Union Petroleum Company under the laws of the State of New York, and that the defendants were trustees thereof at the times of the defaults sued for.

The fourth allegation is,

"That the said plaintiffs brought their plea of trespass on the "case against the said Union Petroleum Company of New York, in "the Court of Common Pleas for the County of Venango, in the "State of Pennsylvania, in which action the said Union Petroleum "Company duly appeared, and that said action was thereafter, and "on or about the 9th day of September, 1873, on the petition of "the said Union Petroleum Company, verified by the affidavit of "Abijah Curtis, one of the defendants above named, removed to the "United States Circuit Court for the Western District of Pennsyl-"vania. And that on the 30th day of July, 1874, and before the

" time for filing the annual report hereinafter mentioned, the above-
" named plaintiffs duly recovered a judgment in the said action
" against the said Union Petroleum Company of New York in the
" Circuit Court of the United States in and for the Western Dis-
" trict of Pennsylvania by the judgment and consideration of said
" Court having jurisdiction therein, and of the said Union Petro-
" leum Company of New York for forty thousand five hundred dol-
" lars ($40,500) damages, and three hundred and twenty-eight
" dollars and ninety-seven cents ($328.97) costs, which judgment
" was duly given, and still remains in full force and effect, not satis-
" fied or annulled, and no part thereof has been paid."

The fifth paragraph alleges the failure of the defendants as trustees to make, publish and file a report within twenty days from the first day of January, 1875, as required by law, and the complaint demands judgment for the sum of $40,828.97 (Record, p. 8). The defendants separately demurred (Rec., p. 9) on the ground that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was argued before Justice BLATCHFORD, who sustained it, and thereafter the judgment now reviewed was entered on the 16th of November, 1880 (Rec., p. 15). A brief opinion was given (p. 13), and the demurrer was sustained solely on the authority of the case of Miller vs. White, 50 N. Y., 137.

SPECIFICATIONS OF ERROR.

The decision was erroneous and judgment overruling the demurrer should have been rendered.

BRIEF.

First Point. The statute of the State of New York under which the liability of the defendant is claimed is contained in § 12 of chapter 40 of the laws of 1848, as amended by the laws of 1871, ch. 657, § 3. It is as follows:

" § 12. Every company shall annually, within twenty days from
" the first day of January, make a report, which shall be published
" in some newspaper published in the town, city or village, or if
" there be no newspaper published in said town, city or village, then

" in some newspaper published nearest the place where the business " of said company is carried on, which shall state the amount of " capital, and of the proportion actually paid in, AND THE AMOUNT " OF ITS EXISTING DEBTS, which report shall be signed by the " president and a majority of the trustees, and shall be verified by " the oath of the president or secretary of said company, and filed " in the office of the Clerk of the County where the business of the " company shall be carried on, and if any of said companies shall " fail so to do, ALL THE TRUSTEES OF THE COMPANY SHALL BE JOINTLY " AND SEVERALLY LIABLE FOR ALL THE DEBTS OF THE COMPANY THEN " EXISTING, and for all that shall be contracted before such report " shall be made. But, whenever, under this section, a judgment " shall be recovered against a trustee severally, all the trustees of " the company shall contribute a ratable share of the amount paid " by such trustee on such judgment, and such trustee shall have a " right of action against his co-trustees, jointly or severally, to re- " cover from them their proportion of the amount so paid on " such judgment."

Second Point. The question presented under this act is whether the allegations of the complaint of the recovery of the judgment, shows a DEBT for which the trustees would become liable under the statute on the failure to comply with the terms of the statute. A consideration of the policy of the act, its purposes and the methods adopted to attain the purposes, will aid in its construction. It has received interpretation in the case of Bruce vs. Platt, 80 N. Y., 386, where the Court say :

" Applied to an existing corporation transacting business, the " provisions of this section are beneficial. The report enables " persons dealing with such a corporation to determine the credit " to which it is entitled, or if a present creditor, whether he shall " enforce payment or give further time."

In Jones vs. Barlow, 62 N. Y., 208, the same intent is given by FOLGER, J., in his dissenting opinion.

The requirement of the act is that the report shall state "*the amount of its existing debts*," and says that the trustees in default shall be liable for "*the debts of the company then existing*," and for all that shall be contracted before such report shall be made.

It is manifest that two classes of debts are provided for. Those

then existing of course cannot have been created in any reliance on the reported condition of the company at the time of the failure to file the report, and that those subsequently contracted may have been so incurred, show that the penalty is for the past as well as for the future.

Third Point. To offer argument or authority to show that a judgment against a company "is an existing debt of the company," would seem unnecessary, and whatever might have been its origin, the rendition of the judgment has conclusively established the debt. The distinctions made in certain conflicting cases between judgments and contracts can have no bearing here.

O'Brien vs. Young, 95 N. Y., 428.
Taylor vs. Root, 4 Keyes, 344.

Fourth Point. The case of Miller vs. White, on which the decision below was based, is reported in 57 Barb., 508; 59 Barb., 443, and 50 N. Y., 137. It shows this peculiarity, that the debt for which the trustees became liable was *contracted* prior to the default, and only put in judgment *after* the default. This is obvious from the report of the case in 59 Barb., 435, where the complaint alleged that on the first of January, 1865, the company was indebted, that the judgment was recovered on this indebtedness in June, 1866, and that no report was filed in January of 1865–66–67 or '68.

In its opinion the Court of Appeals (50 N. Y., 137), says:

"The right of action in this case arose, if ever, at the expiration "of twenty days from the first day of January, 1865; *at that time the* "*judgment had no existence.* It was not recovered until June, 1866.

"*It is true that the plaintiffs aver defaults in the company in mak-* "*ing said reports for the years 1866, 1867 and 1868, but no evidence* "*was given of any default except in January, 1865.* * * * The "question involved in this case is not free from doubt or difficulty. " * * * I think the principles of the law are better sustained "by holding this judgment not evidence against these defendants, "that they are neither parties nor privies to it, and that they should "not be bound by it."

Fifth Point. The Courts of the State of New York have refused to follow this case except within the strict limits of the facts presented by it. In the case of Lewis vs. Armstrong, 8 Abb., N. C., 385, decided in April, 1880, the following opinion was rendered:

Lewis vs. Armstrong, Abbott's New Cases, volume 8, page 386. Special Term, April, 1880.

VAN VORST, J.:

This is an action brought against the defendants, as trustees of the Manhattan Glove Company, a corporation formed under the Act of February 17, 1848, and the amendments thereof. The defendants' liability arises from the company's neglect to make and file, within twenty days of January 1, 1878, the annual report required by section 12 of the act. By such failure the trustees of the corporation are made jointly and severally liable for all "the debts of the company then existing" (for what are existing debts see Carley vs. Hodges, 19 Hun, 187), and for all that shall be contracted before such report shall be made.

The plaintiffs' claim, for which it is sought to charge the defendant, is founded upon a judgment recovered against the corporation for the sum of $1,036.32, upon which there has been paid the sum of $180, leaving still due $856.32.

The defendant Armstrong demurs to the complaint, alleging, as grounds of demurrer, that the same does not state facts sufficient to constitute a cause of action. The complaint is defective, as is urged, in not setting up the original indebtedness upon which the judgment was based. In support of this view reference is made to Miller vs. White, 50 N. Y., 137. But an examination of that case shows that it does not dispose of the question here distinctly raised. In Miller vs. White, at the time the cause of action arose, through the omission to file a report, the judgment against the corporation was not in existence; it was not, in fact, recovered until eighteen months thereafter, and there was no evidence of any default in making reports after the recovery of the judgment.

The liability to which the defendant was therefore exposed in that case, when the default in making the report occurred, was an open contract debt existing against the corporation.

The existence of such indebtedness was sought to be established on the trial by the record of a judgment afterwards recovered. In the Court below, upon the trial, such record was held to be con-

clusive evidence of such indebtedness. The Court of Appeals, however, reversed the judgment and held that it was neither conclusive nor even *prima facie* evidence of the fact of indebtedness at the time the default arose.

PECKHAM, J., says: "The right of action in this case arose, if ever, at the expiration of the twenty days from January 1, 1865. At that time the judgment had no existence. It was not recovered until June, 1866. It is true that the plaintiff avers defaults in the company in making said reports for the years 1866, 1867 and 1868, but no evidence was given of any default except in January, 1865."

In the case we are now considering, when the default arose in January, 1878, the plaintiffs' original claim was merged in their judgment against the corporation, which was the only debt they had against it.

Had it at that time existed in open account, which was subsequently put in judgment, the case would be like Miller vs. White. This being a penal statute, is strictly construed, and when the trustees are declared to be personally liable for the debts "then existing," the quality of the debt as it then stood, including its consideration, is a substantial matter, and an after acquired judgment against the corporation may properly be held not conclusively to establish it.

It is quite true that it has been held in some cases that the original claim is not merged in a judgment against the corporation. Such conclusion has been reached in cases where the creditor, after a default by the company to make and file the annual report, has prosecuted the corporation or taken its notes for the original demand.

In such cases it has been held that the original claim, to which the trustee was exposed when the default occurred, was not so merged in the judgment or notes as that the creditor could not enforce his claim against the trustee for its amount. It was so held in Deming vs. Puleston (3 J. & S., 309; S. C., 55 N. Y., 655). In such cases the creditor's claim against the trustee is limited by the character of the debt when the default arose.

Here the only claim to which the trustee was exposed was the judgment against the corporation. It is, however, urged that the judgment may have been collusively obtained; but there can be no presumption that it was. Until it is in some way questioned, it is to be taken as a valid debt. If any action shall be taken against

the corporation it must be on the judgment, as the evidence of its indebtedness.

If there was any fraud in the recovery of this judgment, which has been standing since the year 1875, and upon which a payment has been made, the defendant, who has been a trustee during the whole period, would be likely to know something in respect to it, and if there was relief against it, it was clearly his duty to have had it vacated or opened. And if, for any reason, the judgment is not an existing debt against the corporation, or if it was fraudulently obtained, the matter should be set up by way of answer to this complaint. That such inquiry could be had in this action, Miller vs. White, 50 N. Y., 140, clearly enough shows (see also McMahon vs. Macy, 51 N. Y., 155; Hastings vs. Drew, 76 *Id.*, 9).

The learned Judge who delivered the opinion of the Court of Appeals in the case last cited, says: "The question involved in this case is not free from doubt or difficulty." Such doubt and difficulty arose with respect to the effect to be given to a judgment recovered against the corporation, subsequently to the happening of the defaults through which the plaintiff's cause of action arose, upon which he exclusively rested his case. But I should conclude that that case does not and was not intended to decide, that a judgment which was in existence as a debt of the corporation at the time the default of which complaint is made happened, and had been so standing, for all that appears, unchallenged for several years, is not a debt within the meaning of the statute, for which the trustee in default is responsible.

It may be that a judgment does not possess all the attributes of what is commonly understood to be a contract. In one view it is a new debt, and in another it is the highest expression and evidence of a previously existing obligation or duty. But every presumption is in favor of its justice and its validity. In the statutes of New York it is styled a debt, and is classed among obligations of a deceased person, to be paid as such.

Blackstone calls it a "debt of record," and says of it, that when "any specific sum of money is adjudged to be due from the defendant to the plaintiff in an action, this is a contract of the highest nature, being established by the sentence of a court of justice" (2 Black. Comm., 465).

Broom, in his "Commentaries on the Common Law," page 262 in his classification of contracts, places in the first rank "contracts of record, such as judgments."

In Morse vs. Toppon (3 Gray, Mass., 411), it is said: "A judgment is in the nature of a contract. It is a specialty and creates a debt, and to have that effect it must be taken against one capable of contracting.

An action upon a judgment is defined to be one arising upon contract (McGuire vs. Gallagher, 2 Sandf., 402; Mahoney vs. Penman, 4 Duer, 603, and note at end of that case; Taylor vs. Root, 4 Abb. Ct. App. Dec.).

The question is not, was this judgment a "debt of record" against this defendant, but was it a debt against the corporation when the default occurred? I am not prepared to decide that this judgment was not a debt existing against the corporation when the default happened, and must hold the plaintiff's complaint to be free from the objection which the demurrer interposes.

There should be judgment for the plaintiff on the demurrer, with liberty to the defendant to answer on payment of costs."

The Court of Appeals has by its later utterances discarded the authority of Miller vs. White. The argument in Miller vs. White was that the judgment being obtained without the privity of the trustee he was not bound by it. It certainly is of as high a character as evidence of a liability against the company as would be the declaration or admission of one of the officers in the business of the company, and yet in Hoag vs. Lamont, 60 N. Y., 97, an action against trustees on this precise statute, where evidence of declarations of the president of the company was offered on the part of the plaintiff for the purpose of proving the obligation or indebtedness of the company, the Court uses this language:

"The declarations of Walbridge, the president of the company, "in a matter affecting the business of the company, and in respect "to which he was acting for it would have been admissible *as evi-* "*dence against the company*, to establish its liability, and *were there-* "*fore competent against the defendants* to prove the obligations and "indebtedness of the company."

Sixth Point. The judgment is evidence in this action of the debt of the company *ex necessitate*. The action was for trespass on

the case, for a tort (entering upon and taking oils from the lands of the plaintiff), which was unliquidated except by the verdict which possibly contained an allowance in the nature of punitive damages. It was impossible of exact computation, containing allowances for costs provable in no other way. It would be absurd, unreasonable and productive of uncertainty and confusion to require the submission to another jury of the facts which led to this verdict, for if they found a less amount it is palpable that a *part* only of the debt of the company would be recovered against these defendants who are liable for *all* the debts of the company. If they gave a larger verdict these defendants would be the first to complain. Under the statute they are severally as well as jointly liable. Each one could be sued apart from the others, and if one trustee is sued alone, all the trustees shall contribute a ratable share of the amount paid on such judgment. If in each suit against each trustee the whole evidence of the original claim had to be gone into and separate verdicts rendered, which might be for very dissimilar amounts, the contribution would become a matter more involved than the original claim. As the theory on which the judgment is made conclusive, is that the parties to it have had their day in Court and have exhausted their proofs, they are thereby estopped from denying its validity. The doctrine of estoppel would equally apply to the officers of the corporation and would bind the corporation. Suppose the action were on a FORGED acceptance of the company which an innocent holder had purchased on the company's declaration, through its authorized agent (Clews vs. Bank of N. Y., 89 N. Y., 419), of genuineness, or suppose the company had sold personal property which it did not own, the implied warranty of title would constitute a perfect contract; or where a surety for the company should pay the amount represented by the company to be due to the creditor: in all such cases the same principles would apply to the declarations or admissions of the company, and would constitute evidence of its liability to bind the trustees in the action against them.

Seventh Point. But the true question in this case was not whether the judgment would be *received in evidence* on a trial of the cause, but whether the pleading presented facts which showed a right to recover on the part of the plaintiff. Whatever may be the

ruling of the State Courts in respect to admissions of evidence, they are not binding upon the United States Courts, because such decisions do not present a case of statutory construction.

McNiel vs. Holbrook, 12 Peters, 84.
Town of Venice vs. Murdock, 92 U. S., 494.

In the case last cited the Court says:

"It is argued that the New York decisions are judicial construc-
"tions of a statute of that State; and, therefore, that they furnish
"a rule by which we must be guided. The argument would have
"force if the decisions, in fact, presented a clear case of statutory
"construction; but they do not. They are not attempts at inter-
"pretation. * * * They assert general principles. * * *
"They do not assert that the statute so declares, or that such is
"even its implied requisition. There is, therefore, before us, no
"such case of the construction of a State statute by State Courts
"as requires us to yield our own convictions of the right, and
"blindly follow the lead of others, eminent as we freely concede
"they are."

The view that a judgment is evidence against the trustee of a liability of the corporation is supported by numerous very respectable authorities in the State of New York.

Slee vs. Bloom, 20 John., 668, 684.
Moss vs. McCullough, 5 Hill, 131.
" " " 7 Barb., 289.
Moss vs. Averell, 10 N. Y., 450.
Belmont vs. Coleman, 1 Bosw., 189.
" " " 21 N. Y., 96.
Peckham vs. Smith, 9 How. Pr., 436.
Squires vs. Brown, 22 How. Pr., 35.
Witherhead vs. Allen, 28 Barb., 661.
Andrews vs. Murray, 9 Abb. Pr., 8.

And in other States and England:

Ultey vs. Tool Co., 11 Gray, 139.
Farmin vs. Ballard Vale Mfc. Shop, 12 Cushing, 507.
Dauchy vs. Brown, 24 Vt., 197.
Milliken vs. Whitehouse, 49 Me., 527.
Corse vs. Sandford, 14 Iowa, 235.
Wilson vs. Pittsburgh, &c., Coal Co., 43 Pa., 424.
Gaskill vs. Dudley, 6 Metcalf, 546.
Green vs. Nixon, 23 Beavan, 538.
Bank of Australia vs. Nias., 4 E., L. & E., 252.
Thompson's Liability of Stockholders, § 329 *et. seq.*

In Hastings vs. Drew, 76 N. Y., 15 (an action by a judgment creditor to reach property of the corporation in the hands of the defendants), the Court said:

"It is insisted that the *judgment* recovered against the corporation is not evidence against the defendants. The action is in the "nature of a creditor's bill to reach the property of the corporation, which is in the possession of the defendants, and liable for "its debts. It being final and conclusive against the corporation, "who appeared and defended, and now sought to be enforced "against the corporate property, it follows that it is conclusive "against the trustees and stockholders, provided they received and "appropriated the property for their own use in accordance with "the findings. The authorities cited by the defendant's counsel in "reference to this branch of the case do not sustain the doctrine "that the judgment *was not* evidence (Miller vs. White, 50 N. Y., "137, McMahon vs. Macy, 51 *Id.*, 155). In each of the cases cited, "the action was brought to *enforce* a liability under a statute highly "penal in its character, and the rule *in such cases*, has no applica-"tion here. No reason exists why, in a case of *this* nature, where "the action is brought to reach property of the corporation, which "was subject to the lien of the judgment of the plaintiff, and to ap-"ply the same to its payment and satisfaction, the judgment should "not at least be regarded as *prima facie* evidence."

The reasons given for the distinction show the weakness of the argument. That the action was highly penal should certainly make no difference in the laws of evidence.

Eighth Point. In Murray vs. Andrews, 9 Abb. Pr., 8, to enforce a similar liability, a judgment for costs was held a debt against the company and evidence of such debt, and for the costs the judgment is necessarily not only the only evidence of the existence of the liability, but the creator of it.

Ninth Point. In Miller vs. White, 50 N. Y., 137, the Court says (p. 142):

"I do not mean to say that the defendants might not have been "bound by the judgment by their conduct in the actual defense of "that suit against the corporation."

One of the allegations of this complaint is that the defendant, Abijah Curtis, took part in the defense in that action. It is shown that the proceeding was removed from the State Court to the United States Court on the petition verified by him.

Tenth Point. There is nothing said in the case of Miller vs. White which would lead to the construction that a judgment was not a debt of the company. Its whole scope is confined to the effect of the judgment as evidence of the debt, and, as said before, when that question arises on the trial of this case, the United States Courts will determine for themselves what is or is not evidence.

In Rorke vs. Thomas, 56 N. Y., 560, an action to hold trustees liable under § 13 for having declared a dividend diminishing the assets of the company while they were indebted, it was held that the liability for all the debts of the company then existing did not include a liability for the cost of a judgment perfected *after they had ceased to be trustees.*

Eleventh Point. It will be contended that under the terms of the statute, the defendants are not liable except for *debts contracted*, and that inasmuch as a judgment is not contracted they can escape liability. The cases relied on will be :

Heacock vs. Sharman, 14 Wend, 59, which construed the acts incorporating the Buffalo Hydraulic Association, the action being against a stockholder *for an injury* arising from a failure of the association to keep a bridge in repair. The statute provided "the "stockholders of the said corporation shall be holden jointly and "severally to the nominal amount of their stock for the payment of "all *debts contracted* by the said corporation or by their agents, and "any person or persons having any *demand* against said corpora-"tion may sue any stockholder or stockholders and recover the "same with costs."

NELSON, J., said :

"The term *demand* is undoubtedly broad enough, if it stood "alone, to embrace the claim of the plaintiff. We must, however, "look at the whole section and the connection in which it stands, in "order to fix its meaning in this case. The stockholders, in the

"first place, are made jointly and severally holden for the payment "of all *debts contracted* by the corporation or by their agents. The "liability is here declared. It is new and unknown to the common "law, and is in terms limited to demands *ex contractu*."

The difference between the statute considered by Judge NELSON and the one now under review is manifest. It speaks of the publishing of a notice which is required to state the amount of its *existing debts*, and makes the liability of the trustees for "all the debts of the company then existing," and then it adds to that a further liability for all that shall be *contracted* before such report should be made.

Judge STORY in the case of Carver vs The Braintree Mfg. Co. (2 Story, 448), considering this question in construing a Massachusetts statute which provided that

"Every person who shall become a member of any manufacturing corporation shall be liable in his individual capacity for all "debts contracted during the time of his continuing a member of "such corporation." In a case involving the question whether this liability extended to unliquidated claims arising from Torts says:

"The question turns therefore upon the meaning of the words "debts contracted in the statute. Do they mean literally and "strictly such debts as are due and payable in money, *ex* "*contractu* by the positive or implied engagements of the corporation and resolve themselves into liquidative or determinate "sums of money, due as debts, or do they extend to all legal "liabilities incurred by the corporation, and which, when fixed by "judgment or award, or otherwise, are debts of the corporation? "And if the latter be the true meaning, then does the statute "liability exist only from the time when it becomes an ascertained "debt of the corporation, or does it relate back to the origin of "the liability and bind the corporators from that time?

"If the words 'debts contracted, in the statute, are to receive "the limited construction, that they are applicable only to debts "in the strict sense of the term, that is, contracts of the party for "the payment of money and nothing else, it is obvious that the "purposes of the statutes would be comparatively of little value "* * * Suppose an insolvent corporation should unlawfully, "under an unfounded claim of right, convert one hundred or one "thousand bales of cotton belonging to a third person, we see "that the mischief could be redeemed only by an action of trover "for unliquidated damages; and if the individual corporators

" were not liable, therefore *after an unsatisfied judgment* the " statute would be little more than a delusion. If, on the other " hand, we should construe the statute broadly as a remedial " statute, and give to the word 'debts' a meaning not unusual, " as equivalent to 'dues,' and to the word 'contracted' a meaning, " which, though more remote, is still legitimate, as equivalent to " 'incurred,' so then the phrase 'debts contracted,' in this sense " would be equivalent to 'dues owing' or 'liabilities incurred,' " the statute would attain all the objects for which it seems de- " signed. * * *

" If it covers cases of unliquidated damages *ex contractu* it, " is difficult to say why it should stop there and not go further " and cover cases of unliquidated damages arising from torts to " property, in such case there is no debt until the damages are " ascertained and liquidated, and then the debt seems to relate " back to its origin."

Mill-Dam Foundry vs. Hovey 21 Pick., 465 (alluded to by STORY in his opinion), a Mass. Statute made officers liable for all debts and contracts in case of their neglect to file an annual report. The Court hold that this included liability for unliquidated claims, and add as to the purpose of the statute:

" The manifest object was to enable the public to judge from " time to time of the condition of such corporations by enabling " them at one view to compare the capital with the debts."

Esmond vs. Bullard (16 Hun, 68), which will also be relied on by the defendants—was an action upon this same statute. Two defenses were interposed.

FIRST. That it was not sufficient to found the claim upon the judgment creating the debt against the corporation, but that the action must be founded on the original claim, which being for damages occasioned by a tort, did not constitute a debt contracted as the statute requires.

SECOND. That the claim was barred by the Statute of Limitations.

In the Supreme Court the decision was put on the ruling of the Court of Appeals in Miller vs. White, and it was held that as the judgment was not evidence against the trustees there was no proof of liability on the part of the corporation; as plaintiffs did not prove the amount of the damages, or that the explosion was due to the negligence of the corporation, and as matter *obiter* the Court adds: " A liability for a tort is not a debt under a statute which is to be

" construed strictly. It is not contracted, for it does not grow out " of contract."

This case was reviewed by the Court of Appeals and affirmed in the 79 N. Y., 404, under the title of Losee *et. al.*, Executor,s vs. Bullard, and the sole question considered by that Court was the Statute of Limitations, and whether the company had become dissolved by failing to do business from 1865, and it says finally :

" The points discussed are quite sufficient to sustain the judg- " ment without reference to the question whether the plaintiff's tes- " tator was a creditor, for whose claim a trustee could be liable " under the statute, or to the point that the judgment against the " corporation was not evidence of its indebtedness, as against the " trustees."

Under the Bankruptcy Act debts only were provable, and a tort was not a debt, but a judgment entered in an action for tort was a provable debt.

See

In re Hennocksburgh vs. Block, 7 Bank Reg., p. 37.

The Court of Appeals has itself ruled that judgments are evidence of the amount of damage, even when *inter alios*, in 1st Nat. Bk. vs. 4th Nat. Bk., 89 N. Y., 412) even in an action of tort. They say : " This judgment rendered by a Court of competent jurisdiction " in an action presenting all the material facts conclusively estab- " lished, as between the parties thereto, that the receipt of the " check of Culver, Penn & Co., and the omission to make due " presentment thereof, discharged the drawer's liability on the " draft. The record was, we think, *competent evidence* in this case " upon the question of damages."

As heretofore shown the Courts have received the admissions of officers of a corporation to establish the existence of the debt of the corporation in the action against the trustee. Of what higher rank could be the admission, spoken or written, than the adjudication of the Court in the contested action. As was said in the case of Miller vs. White, 57 Barb., 510 :

" There can be no pretense of hardship in enforcing the rule, for " if a judgment is unjustly obtained they are guilty of gross derelic- " tion of duty if they fail to use the means provided by law to have " the judgment reversed or vacated. If they allow an unjust judg- " ment to remain in force against the corporation whose interests

" they have undertaken to guard, they cannot complain when it is " enforced against them personally."

Twelfth Point. It is submitted that this Court is not required to follow the rulings of the State Court based on conflicting authorities which the later decisions of that Court have refused to follow, or have distinguished so as to destroy their effect, and which are without the foundation of common sense for their support. As is said in Burgess vs. Seligman, 107 U. S., p. 33:

" We do not consider ourselves bound to follow the decisions of " the State Court in this case. * * * The Federal Courts have an " independent jurisdiction in the administration of State laws co- " ordinate with, and subordinate to, that of the State Courts, and " are bound to exercise their own judgment as to the meaning and " effect of those laws. * * * Since the ordinary administration of " the law is carried on by the State Courts, it necessarily happens " that by the course of their decisions certain rules are established " which become rules of property and action in the State, and have " all the effect of law, and which it would be wrong to disturb. * * * " Such established rules are always regarded by the Federal Courts, " no less than by the State Courts themselves, as authoritative dec- " larations of what the law is. *But where the law has not been thus " settled, it is the right and duty of the Federal Courts to exercise their " own judgment.*"

See also

Pease vs. Peck, 18 How., 599.
Faulkner vs. Hart, 82 N. Y., 413.

Lastly. The judgment should be reversed and judgment rendered for the plaintiff on the demurrer.

HENRY J. SCUDDER,
Of Counsel for Plaintiff in Error.

113-462

SUPREME COURT OF THE UNITED STATES.

EDWARD B. CHASE,
Plaintiff in Error,

against

ABIJAH CURTIS and HENRY DE COPPET.

No. 154.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

GEORGE A. BLACK,
Of Counsel for Plaintiff in Error.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

EDWARD B. CHASE,
Plaintiff in Error,

AGAINST

ABIJAH CURTIS and HENRY DE COPPET,
Defendants in Error.

Additional Brief for Plaintiff in Error.

Under leave granted on the hearing of this cause counsel for the plaintiff in error submits the following additional considerations and reply to the defendants' brief.

First Point. Upon the second point in plaintiff's brief as to the construction of the act in question, the language of the Court of Appeals in Jones vs. Barlow (62 N. Y., 205), cited by counsel in the argument from the prevailing opinion of Judge ALLEN, is as follows:

> "The statute is, that upon the failure to make the report mentioned, 'all the trustees of the company shall be jointly and severally liable for all the debts of the company then *existing*, and for all that shall be contracted before such report shall be made.'"
>
> "Their liability is *coextensive* and *concurrent* with that of the corporation. * * *
>
> "No penalty attaches for the default if there be *no debt;* it is the debt which, under the statute, gives the right of action, and which is recovered. * * * The

language of the act is quite explicit, and imposes the liability for 'the debts of the company;' and there is no debt within the meaning of the statute if the day of payment has not arrived. *The object of the statute was to give to the creditors of corporations founded under it security for the performance of the obligations and payment of the debts of the company.* The creditor gets all the protection designed by the statute if he has a cotemporaneous and concurrent remedy against the defaulting trustees and the company.

"ALTHOUGH THE OBLIGATION IS WHOLLY STATUTORY AND ADJUDGED TO BE A PENALTY, IT IS IN SUBSTANCE AS IT IS IN FORM, A REMEDY FOR THE COLLECTION OF THE CORPORATE DEBTS. THE ACT IS PENAL AS AGAINST THE DEFAULTING TRUSTEES, BUT IS REMEDIAL IN FAVOR OF CREDITORS."

In the dissenting opinion of Judge FOLGER in this case, considering the same words of the statute, he says:

"The report is to be filed each year, within twenty days from the first day of January. This means each year after the organization. * * * The act looks to a filing of the report annually after the organization, so that throughout the year, * * * those about to deal with it may have the information called for by the statute.

"THE INFORMATION IS NOT BY THE INTENT OF THE ACT DEEMED OF USE TO THOSE WHO HAVE BECOME CREDITORS OF THE COMPANY, SO MUCH AS TO THOSE ABOUT TO. * * * IT MAY BE DOUBTED WHETHER IT IS TECHNICALLY CORRECT TO CALL THE LIABILITY IMPOSED BY THIS STATUTE A PENALTY. PENAL STATUTES ARE THOSE WHICH IMPOSE A FORFEITURE ON SUCH AS TRANSGRESS THE PROVISIONS OF THEM; BUT WHERE THE STATUTE ONLY GIVES A REMEDY TO THE PARTY AGGRIEVED, IT SHALL NOT BE CONSIDERED AS A PENAL STATUTE.

"(Wynne vs. Middleton, 1 Wilson, 125; Woodgate vs. Knatchbull, 2 T. R., 148–154; Bellasis vs. Burbriche, 1 Ld. Ray., 170–172; Ward vs. Snell, 1 Hy. Blk., 10.)

"But though it may not be technically proper to call this liability a penalty, it is in the nature of a penalty."

Second Point. In reviewing and considering the effect to be given to the decision in Lewis vs. Armstrong (8 Abb. N. C., 386), cited in plaintiff's fifth point, the defendants' counsel in his second point (p. 7 of his brief) has called the attention of the Court to certain cases which he claims were overlooked by the learned Judge who decided Lewis vs. Armstrong, and his contention is that if those cases had been considered by him, he must have arrived at a different conclusion, and the cases he cites are

Esmond vs. Bullard, 16 Hun, 62.
McHarg vs. Eastman, 35 How. Pr., 205.
Reed vs. Keese, 37 Supr. Ct. Rep., 269.
Weymouth vs. Dimock, 41 How. Pr. Rep., 92.

1. Esmond vs. Bullard is dealt with by plaintiff's counsel on page 14 of his brief, and it is there shown that while the Court discussed the case and used the language imputed to it in the extract printed on page 12 of the defendants' brief, yet, as appears by that extract (on page 13 of the defendants' brief), the case was disposed of on the failure of the plaintiff to make proof of any cause of action. That language is:

> THE PLAINTIFFS, THEN, DID NOT PROVE, IN THE PRESENT ACTION, THE AMOUNT OF THEIR DAMAGES, OR THAT THE EXPLOSION WAS DUE TO THE NEGLIGENCE OF THE CORPORATION; AND IF THE JUDGMENT IS NOT EVIDENCE AGAINST THESE TRUSTEES, THEN THERE WAS NO PROOF EVEN OF A LIABILITY ON THE PART OF THE CORPORATION.

And holding, as the Court had, that the judgment was not under Miller vs. White (50 N. Y., 137), "even *prima facie* evidence against them," it follows that all the other remarks of the case were merely *obiter*. As already shown in plaintiff's brief, in the Court of Appeals, the sole question considered was the effect of the Statute of Limitations, the Court disclaiming any discussion of the other questions (see plaintiff's brief, p. 15).

2. McHarg vs. Eastman came up under a demurrer to the complaint, and the sole question presented for the determination of the Court was its sufficiency as a pleading. The facts stated to support the action were *that the debt was contracted on the 3d of April, 1863*. The judgment was recovered on the 24th of October, 1863; the omission to file the report was on the 21st of January, 1864.

Again, as in the previous case, the Court discusses general principles, and among others, asserts on page 206, "a judgment is a debt," but when it comes to consideration of the defect in the complaint, which was the matter before it for adjudication, it uses the following language (p. 208):

> "But the complaint is defective, I think, in not averring that the debt was existing at the time the trustees were in default, by omitting to publish their annual report, or was contracted afterwards. * * * It is not alleged that the judgment, or the debt against the corporation, is unpaid; or that it was unpaid when the trustees failed to make their report * * * Again, the statute makes the trustees liable, but it is not averred that the defendant was a trustee at the time of the default."

There follows these clauses, which are omitted in the defendant's extract from the opinion.

> "FOR THE REASON ASSIGNED * * * THE FACTS STATED IN THE COMPLAINT ARE NOT SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION. * * * THEREFORE, THE DEMURRER SHOULD HAVE BEEN SUSTAINED."

3. In Reed vs. Keyes (37 Supr. Ct., 269) the plaintiff recovered a judgment against a *trustee*, who was the *appellant*, and only his objections to the proceedings on the trial were reviewed by the Court which affirmed the judgment. At p. 274 the learned judge uses the language cited on page 16 of defendant's brief, by which it appears that, following Miller vs. White, "*the judgment against the corporation seems to have been excluded on the trial of this case.*" And inasmuch as there was nothing in such exclusion which injured the defendant, there was nothing for the Court to review on that branch of the case, and it decided nothing concerning it.

4. In Weymouth vs. Dimock (41 How. Pr. Rep., 92) an examination of the case shows a very important omission in the defendants' statement of the facts on page 17 of his brief. The motion was, in that case, to strike out the allegation of the complaint; that the plaintiff had recovered a judgment against the company for the said debt, and issued execution thereon, which had been returned unsatisfied as *irrelevant matter*. Attention is called to the peculiar facts of that case.

It is alleged that on the 7th of January, 1869, the said corporation was indebted to the plaintiff. That on the 11th of March, 1869, the plaintiff recovered judgment against said company. That the said *company* did not file an annual report as required by law within the first twenty days of January, in the years 1868, 1869, 1870 and 1871. The important omission in the defendant's statement of the case are these two dates—1868 and 1869. And for these reasons, under the language of the act in question, the trustees would be liable for any debt contracted before such report should be made, and if the company was indebted on the 7th of January, 1869, and had not published a report in 1868, the trustees were liable for that default, "as for a debt contracted before such report shall be made," and were also liable for a failure to make their report before the 21st of January, 1869, as for a debt "then existing;" and, inasmuch as the judgment was not recovered until March, 1869, the allegations in respect to it were irrelevant matter so far as applied to the two defaults of 1868 and 1869, which was clearly the ground on which the case was disposed of by the Court.

Third Point. Thus analyzed the cases above cited in no respect conflict with, or were important to be considered, in the decision of Lewis vs. Armstrong.

Fourth Point. Rorke vs. Thomas, 56 N. Y., 539, cited on page 13 of defendants' brief, is imperfectly stated. The Court held that the judgment did not bind the trustees in that case, but the counsel has failed to point out the reason assigned by the Court, which appears in the syllabus of the case on page 560 in these words:

> "The trustees are not liable under said section for the costs in a judgment against the company perfected AFTER THEY HAD CEASED TO BE TRUSTEES."

Fifth Point. The citation on defendants' brief, at page 17, from the Whitney Arms Co. vs. Barlow (63 N. Y., 72), conveys but a portion of the meaning of the Court in that case.

The expressions used: "The *naked* admissions of the corporation, or judgment as against the corporation, are not evidence against the trustees. They are *res inter alios acta*," are followed by the statement, "but when *facts* are proved which would "establish the existence of a debt against the corporation, the "liability of the trustees for the debt follows upon the proof "of the other facts upon which the liability is made by statute "to depend. * * * The trustees are, by the statute, made "*privies* to the acts and doings of the corporation in the trans-"action of its business resulting in a pecuniary debt or liabil-"ity." And the word 'facts' here used must be understood in the sense of declarations or admissions, such as operate as an estoppel, in spite of the expression "naked admissions" which the Court has inconsiderately used in its former statement.

See Espey vs. The Bank of Cincinnati, 18 Wall., 604—3d section of the syllabus, which is that "where a party to whom "such a check is offered sends it to the bank on which it is "drawn *for information*, the law presumes that the bank has "knowledge of the drawer's signature and of the state of his "account, *and it is responsible for or may be liable on these* "*points*." And Clewes vs. Bank of New York, 89 New York, 419, to the same effect.

Sixth Point. Under the seventh point counsel for the plaintiff has cited cases in the State of New York, holding that the judgment is evidence in an action against the Trustees and stockholders of corporations. For convenience of reference, extracts from some of those decisions are here set forth.

Slee vs. Bloom, 20 John., 684, in the Court of Errors, 1822. The statute provided (p. 683, of the report) as follows:

> "For all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing such company shall be individually responsible to the *extent of their respective shares of stock* in said company and no further.

At page 684, Judge SPENCER, delivering the opinion, says:

> "I perceive no escape from the conclusion that the respondents are individually liable to the same extent that

> the company itself was liable. *Whatever was a debt* against the company is now, *by force of the statute*, a debt against them, and if the company itself was concluded, the respondents are equally concluded. * * *
> If it has then been shown that the sum claimed as a debt was fraudulently enhanced or that the liquidation of the account is either fraudulent or founded in error, provided a foundation has been laid for such proof, the respondents will be entitled to relief. And we must regard the judgment as a *solemn admission*, merely, on the part of the company, for it is not of itself, *res adjudicata*, binding on the stockholders if it was procured by fraud or is founded in error.

In Moss vs. Oakley, 2 Hill, 265, decided in 1840, BRONSON, J., says:

> "As against the company, the judgment is conclusive evidence that the note is valid, and although the defendant is not *directly a party, yet as a stockholder* he is not altogether a stranger to the judgment. As against him I think the declaration makes it a *prima facie* case of indebtedness by the company."

Moss vs. McCullough appears in the reports three times, first in 1843, 5 Hill, 131; second in the Court of Errors, 5 Denio, 567; third in 1849, 7 Barb., 279. In the last report (7 Barb.) a General Term, composed of PAIGE, WILLARD and HAND, Judges, reviewed the case on appeal from the second trial, and considered the effect of the decision reported in 5 Denio, 567, and WILLARD, J., writing the opinion, says (p. 293):

> "I think the learned Judge erred also in excluding evidence of the recovery of judgments against the company on notes given by the president. *Such judgments afforded persuasive evidence* that the company acquiesced in the acts of their officers in giving the notes. Unless it was shown that these judgments were collusively obtained, they afforded *competent evidence* of the usage of the company with respect to the authority conferred on their officer."

This statement of the law was approved by the same Judge sitting as a member of the Court of Appeals, in Moss vs. Averill, reported in 10 N. Y., 453, where the judgment was affirmed by a divided Court.

The above cases were all actions against stockholders, and the views there entertained of the competency of the judgment as binding such stockholders, are reiterated in the Court of Appeals in the very late case of Stephens vs. Fox, 83 N. Y., 313, which will be further commented on later.

In Squires vs. Brown (22 How. Pr., 35), decided in 1860 by a General Term of the Superior Court composed of BOSWORTH, WOODRUFF and WHITE, the action was against trustees under § 12 of the act in this case considered. Judge WOODRUFF writing the opinion, at p. 29, says:

> "The decision of this Court in Belmont vs. Coleman 1 Bos. Rep., 188, is to the effect that where stockholders are sought to be charged in a like case, a judgment against the corporation is complete evidence to prove the indebtedness.
>
> In that case the authorities bearing on the question are collected and reviewed, and that decision must be taken to *dispose* of the question in the present case.
>
> IF COMPETENT AS AGAINST THE STOCKHOLDERS OF A CORPORATION, MUCH MORE SHOULD IT BE HELD COMPETENT AS AGAINST THE TRUSTEES TO WHOM THE MANAGEMENT OF ITS AFFAIRS IS CONFIDED. It is sufficient to say that it was *prima facie* evidence of the indebtedness; and if it be conceded that it was not conclusive, and might be overcome by proof that it was obtained by fraud or collusion, or by proof that no such indebtedness in fact existed, still it was not erroneous to receive it in evidence when offered.
>
> *Note:* Belmont vs. Coleman was affirmed by the Court of Appeals, 21 N. Y., 96.

In Miller vs. White (50 N. Y., 137), the Court, by PECKHAM, J., say at p. 142:

> "In the case at bar the defendants are directly neither principal debtors with the company, nor sureties. The statute simply imposes a penalty upon them for the omission of a prescribed duty. It compels them to pay the

> debt of another. I ADMIT THAT THERE IS AS MUCH GROUND AS A GENERAL RULE, FOR HOLDING THESE DEFENDANTS AS FOR HOLDING STOCKHOLDERS—BUT NOT NECESSARILY MORE. They do not necessarily have notice of the suit against the company, if one be brought. Service may be made upon some other officer. In this case, I think, each of the defendants swears that he never heard of the suit against the company until this suit was commenced. I do not mean to say that the defendants might not have been bound by that judgment by their conduct in the actual defense of that suit against the corporation."

In commenting on the cases in the State of New York, the learned author of *Thompson's Liability of Stockholders*, at § 330, p. 397, uses this language:

> "Thus, a proceeding to charge a trustee or director under a statute making him personally liable for the debts of the company in consequence of certain official defaults is *penal* in its nature, and it is hence obvious that the proceedings should be taken strictly in his favor. On the other hand, he is one of the agents of the corporation, whose duty it is to defend the litigation of the company. If he has done his duty in this regard, and a judgment has gone against his principal, it would as certainly go against him upon a separate litigation between him and the judgment creditor. But if he has failed in his duty to his principal in this regard, and has suffered a judgment to go against it by collusion or default, then he ought not to enjoy an advantage from his own wrong. *In either event it is difficult to see the sense or justice of subjecting the creditor to the expense of a double litigation.*"

In Hastings vs. Drew (76 N. Y., p. 15), the Court of Appeals found it necessary to take a new departure, and to discriminate, Miller vs. White (50 N. Y., 137), and to overrule, McMahon vs. Macy, 51 N. Y., 155. This latter case, although stated in the opinion of Hastings vs. Drew, to be under a statute highly penal in its character, appears on examination to be under a statute providing for the liability of the stockholders for their unpaid subscriptions and for the debts of the company to servants and laborers, which has been at other

times held by the Court, not to be penal in its character. (See further comments on Hastings vs. Drew, on the 11th page of plaintiff's brief.)

Stephens vs. Fox (83 N. Y., 317), follows Hastings vs. Drew and its comments and discrimination of Miller vs. White and McMahon vs. Macy *on the subject of the evidence* as competent against stockholders on account of the nature of the action rather than the nature of the evidence, show the difficulty the Court was under to give any satisfactory reason for the attempted distinction, and are hardly a good answer to either the argument of Judge WOODRUFF or the comments of Mr. Thompson.

Seventh Point. In Cassell vs. Rolf, 14 N. Y., 332, a principal undertaking the defense of his servant for trespass was held bound by the judgment, and why an agent charged as Judge WOODRUFF says, with the management of its affairs, should not be bound by the judgment against the principal, is not apparent.

Eighth Point. The Sixth Point of defendant's counsel is that the complaint did not state that the corporation was carrying on business in the year 1875. That would be rather matter of proof than of pleading. No such point was either raised or considered by the Court below, and it, as well as the subsequent distinctions attempted to be made in the second and third subdivisions of defendants' Sixth Point, are answered by a reference to § 519 of the New York Code of Procedure, which requires that "the allegations of a pleading *must be* liberally construed with a view to substantial justice between the parties; and by § 1205 of the Code, providing for several judgments, and by the case of McHarg vs. Eastman (35 How. Pr., 206), where the allegation "as by law required," is held to be sufficient.

Ninth Point. The case of the Victory Webb Printing Co. vs. Beecher (26 Hun. ,50), presented these facts:

The corporation was formed October 6, 1874; its trustees

had filed no annual report on June 8, 1875; it was indebted to the plaintiff before that date, but the indebtedness had not matured until after that date. A demurrer was interposed to a complaint, setting forth these facts in an action commenced after the passage of the act of June 7th, 1875, amending § 12. The amendment, so far as applicable to the particular case, was that every company shall make a report within twenty days from the first day of January, "*if a year from the time of* "*the filing of the certificate of incorporation shall then have ex-* "*pired*, and if so long a time shall not have expired then within "twenty days from the first day of January in each year after "the expiration of a year from the time of filing such certifi- "cate."

The Court was dealing with the case before it. A year had not expired from the filing of the certificate of incorporation of *that* corporation, and so far as the amendment had any effect it operated to repeal the requirement that as to *such* corporation such report should be filed in the year 1875, and in construing the section the Court must be deemed to be applying its construction to the facts then before it.

The language of the opinion of the Court of Appeals (printed on page 28 of the defendant's brief), affirming the Court below, puts its affirmation on the ground that "the 12th section of the Act of 1848 was repealed and superseded by Chapter 510 of the Laws of 1875."

The plaintiff's comment is that the Court is dealing with a particular state of facts, and that the act in question only repealed the requirement that a corporation which had been in existence less than a year before the first of January, should file an annual report. Otherwise, its decision makes the enactment of an amendment a repeal, and a re-enactment of the original act which cannot be presumed to be its meaning in the face of the authorities to the contrary; (see Ely vs. Holton, 15 N. Y., 595, in which it is said:

> "The form in which amendments, both of the Code and "the Revised Statutes, have generally been made by de- "claring that particular sections shall be amended so as "to read in a given way, was adopted for the purpose of "adjusting them to the original enactments, so that when "the system should, after repeated amendments, become

" complete, the different parts might be put together with-
" out further revision and thus form a perfect Code.
" *The portions of the amended sections which are merely*
" *copied without change are not to be considered* AS REPEALED
" AND AGAIN ENACTED, *but to have been the law all along*, and
" the new parts or changed portions are not to be taken
" to have been the law at any time prior to the passage
" of the amended act."

And the Court says, speaking of a different rule, "The rule contended for would lead to the grossest absurdities." And referring to this case, the same Court, by GROVER, J., in Moore vs. Mansert, 49 N. Y., 335, repeats in substance the above language.

Lastly. On the considerations above presented in connection with the original brief, the judgment should be reversed and judgment ordered for the plaintiff.

GEO. A. BLACK,
Of Counsel for Plaintiff in Error.

113-452

SUPREME COURT OF THE UNITED STATES,

No. 154.

EDWARD B. CHASE,

Plaintiff in Error,

vs.

ABIJAH CURTIS and HENRY De COPPET,
Sued as Trustees, &c.,

Defendants in Error.

BRIEF FOR DEFENDANTS IN ERROR.

PORTER, LOWREY, SOREN & STONE,

Defendants' Attorneys.

GROSVENOR P. LOWREY,

Of Counsel.

C. G. BURGOYNE'S "Quick" Print, 146-150 Centre St., N. Y.

Supreme Court of the United States.

EDWARD G. CHASE,
Plaintiff in Error,

AGAINST

ABIJAH CURTIS and HENRY DE COPPET, Impleaded with JOHN DOE, sued as Trustees of the Union Petroleum Company of New York, in the years 1874 and 1875.
Defendants in Error.

No. 154.
Brief for Defendants in Error.

ERROR TO A FINAL JUDGMENT OF THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK, IN FAVOR OF THE DEFENDANTS IN ERROR ON THEIR SEPARATE DEMURRERS TO THE COMPLAINT.

The suit was begun on December 28, 1877, by a judgment creditor of the Union Petroleum Company, whose judgment is alleged to have been recovered in a Circuit Court of Pennsylvania, in an action of trespass on the case, on July 30, 1874, for $40,500 damages, and $328.97 costs (Rec., fol. 4; 23).

The complaint counts *solely* upon the judgment; and seeks to recover the penalty imposed by the Manufacturing and Mining Act of New York upon the trustees of the Union Petroleum Company, for the failure of the company to make a report of its condition between January 1st and 20th, 1875. [Laws 1875, c.

510, passed June 7, 1875, amending L. 1848, c. 40, § 12, as amended by L. 1871, c. 657.]

The enactment above referred to, is as follows, the words in bracket having been added in 1875, and those in parenthesis in 1871:

"AN ACT to amend c. 657 of the Laws of 1871 entitled an Act to amend the act passed February 17, 1848, entitled an act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes, passed April 20, 1871."

Passed June 7, 1875.

The people of the State of New York, represented in Senate and Assembly do enact as follows:

SECTION 1. The Twelfth Section of the "Act to authorize the formation of corporations for manufacturing, mining, mechanical or chemical purposes," passed February 17, 1848, "as said section was amended by Chap. 657 of the Laws of 1871, is hereby further amended so that Section Twelve shall read as follows:"

"§ 12. Every such company shall, within twenty days from the first day of January, [if a year from the time of the filing of the certificate of incorporation shall then have expired, and, if so long a time shall not have expired, then within twenty days from the first day of January in each year after the expiration of a year from the time of filing such certificate,] make a report, which shall be published in some newspaper published in the town, city or village, or if there be no newspaper published in said town, city or village, then in some newspaper published nearest the place where the business of the company is carried on, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the

" president and a majority of the trustees, and shall be " verified by the oath of the president or secretary of " said company, and filed in the office of the clerk of " the county where the business of the company shall " be carried on, and if any of said companies shall fail " so to do, all the trustees of the company shall " be jointly and severally liable for all the debts of the " company then existing, and for all that shall be con- " tracted before such report shall be made; (but when- " ever under this section a judgment shall be recovered " against a trustee severally, all the trustees of the " company shall contribute a ratable share of the " amount paid by such trustee on such judgment, and " such trustee shall have a right of action against his " co-trustees, jointly or severally, to recover from them " their proportion of the amount so paid on such judg- " ment;) [provided that nothing in this act contained " shall affect any action now pending.]"

" SECTION 2. This act shall take effect immediately."

The suit seeks the recovery from the defendants of this considerable sum of $40,500 with $328.90 costs, and interest.

Not on the ground that they owe the money;

Nor because that they have expressly, or by implication, promised to pay it;

Nor because they have by any act or omission caused the plaintiff to suffer a loss;

Nor even because it appears that they could at some time have changed or avoided the present situation of the plaintiffs or themselves—for such does not appear ever to have been the case.

They are being pursued for a statutory penalty, and the sole question in the case is:

Do the facts set forth in the complaint constitute a cause of action against them under the laws of the State of New York?

The answer will depend on the construction to be given to the penal clause in the so-called Manufacturing and Mining Act of New York above quoted.

That statute is a general law governing the organization and conduct of a certain class of corporations. Such corporations are controlled by Boards of Trustees, who may be of any number from three to thirteen.

The duty of filing an annual report pertains to and can be performed only by "the president and a *majority* of the trustees." A failure by this majority and the president involves, however, the minority—even though protesting and pleading with their fellows to comply with the law—equally in the penalty.

The complaint (fol. 23, Transcript of Record) alleges that "the defendants were trustees to the Union Petroleum Company;" but does not charge either that they constituted the entire board or a majority thereof.

Still more, the original cause of action against the Union Petroleum Company arose out of tort; and it is doubtless true, as suggested in the points of the plaintiff in error, that the judgment now sued upon includes punitive elements addressed to the company by way of warning it against a repetition of the tort.

This Court has before it, therefore, the striking case of a legal attempt to recover a money judgment from parties without fault (so far as appears), in favor of another who, (as between himself and the defendants), is without merit: That is to say, one who has suffered nothing by the alleged default; to whom it is but a lucky accident; and who now claims satisfaction from us of a judgment containing an unascertained proportion of damages allowed on the principles of exemplary and vindictive damages, to punish and to warn a third party.

It will be agreed that so harsh an application of power under the guise of a legal remedy, requires explanation, support and defense at every step, and that it never will be assented to by a court of justice unless the law is imperative.

Is it imperative?

In considering of the proper answer to this question, we must examine the terms and policy of the statute, and inquire whether the Courts of the State of New York have at any time construed it in such a manner as to bind the Courts of the United States, or to furnish them material information touching the local law.

These points will be examined together.

POINTS.

First. This is a penal statute and is to be strictly construed. No provision in it gives to a judgment against the company any effect whatever as against the trustees. It does not establish a contract duty.

Steam Engine Co. vs. Hubbard, 11 Otto, 191-2.
Flash vs. Conn., 109 U. S., 377-8.
Merchants' Bk. vs. Bliss, 35 N. Y., 412.
Wyles vs. Suydam, 64 N. Y., 173.
Whitney Arms Co. vs. Barlow, 63 N. Y., 39.
Bruce vs. Platt, 80 N. Y., 379.

In the last cited case the Court of Appeals said:

"It is settled by repeated decisions applicable to this "case that the statute in question (Laws of 1848, Chap. "40, § 12) is penal, and not to be extended by con- "struction; that in an action to enforce a liability "thereby created, nothing can be presumed against

"the defendants, but that every fact necessary to es-
"tablish their liability must be *affirmatively proved*."
80 N. Y., 381.

In Steam Engine Co. vs. Hubbard this Court says with reference to the same statute: "The defendant "contends that the statute upon which the action is "brought is penal, and should be strictly construed; "in which proposition the Court unhesitatingly con-"curs. It has been repeatedly held that the act was "penal, and that it could not be extended by construc-"tion to cases not fairly within its language."
14 Otto, 191–2.

Under such a construction it is a necessary judgment that neither, (1), the original *tort* sued upon (fol. 23 and fols. 9–10, Transcript of Record), nor, (2), the judgment afterwards obtained thereon were, within the meaning of this act, debts for which these defendants, *as trustees*, can be made liable.

Second. The Courts of New York have consistently —and upon reasons assigned—construed this statute in such a way as to justify the advice of counsel that the facts here alleged do not constitute a legal cause of action.

But for one exception to this statement, now to be noted, this line of decision—rendered principally in the Court of Appeals or the appellate branches of the various superior courts of original jurisdiction—would be unbroken. The exception is the case of Lewis vs. Armstrong, decided at Special Term of the Supreme Court in 1880 and reported in 8 Abb. N. C., 386.

Before passing to the consideration of other cases of authority, it seems proper to give some reasons why this case is of the least authority.

1. It is a judgment at first instance.

2. The attention of the learned Judge (who was delegated temporarily to hold one of the terms of the Supreme Court) appears not to have been called to a decision in the appellate branch of the Court in which he was sitting (Esmond vs. Bullard, 16 Hun, 62), which negatives all his reasoning; nor to a case in the appellate branch of his own Court (McHarg vs. Eastman, 35 How. Pr., 205), in which not only is the reasoning adopted by him expressly discredited, but in which the material fact relied on by him (viz., a date for the judgment prior to the date of the trustee's default), existed just as in the case before him. It is a *nisi prius* judgment, made in apparent ignorance of controlling decisions to the contrary.

3. As a case arising *ex contractu*, it is on principle and authority distinguishable from the present; which arises *ex delicto*.

Stokes vs. Stickney, 96 N. Y., 326.

The authorities in New York will be best considered in the order of their fullness and importance.

1. Miller vs. White, decided in the Court of Appeals in November, 1872, and reported in 50 N. Y., 139, had been previously considered with great fullness in the Special and General Terms of the Supreme Court, where a view of the statute opposed to that finally adopted by the Court of Appeals prevailed. It may be said, therefore, that the question, as there involved, had the fullest consideration in the Court of Appeals. And *unless some substantial difference can be made to appear depending on the comparative dates* of the judgment and the default, a consideration of Miller vs. White must terminate argument.

That no material consideration does thus arise is believed to be demonstrable upon principle and authority; and that demonstration will be attempted, upon and after a consideration of the other cases now to be cited.

In the early stages of Miller vs. White the Supreme Court (57 Barb., 508-9, and 59 *ib.*, 443) had treated the question of a trustee's liability for *penalties* under this section as identical (only "more so") with the ordinary stockholders' liability, saying (57 Barb. 509), after an exhaustive consideration of cases, all except one of which arose on questions of stockholder's liability, "the rule that a judgment is evidence against a stockholder, *or trustee* is supported by such preponderance of authority that it should be left to the Court of last resort to change it if a change is desirable." And (59 Barb., 443) again that Court said, "A trustee is not only a stockholder, but he is an officer of the company, with peculiar means of controlling its affairs, &c.,"

The confounding of the stockholders' liability for judgments against themselves in their corporate form with a trustees' liability for a specific penalty, was thus made complete; and the question went to the Court of Appeals in that state of confusion and misapprehension.

As appeared from the record on appeal, that case differed from this in the sole particulars that, there the original cause of action was a contract and that although in a series of defaults some had occurred before and some had occurred *after* the recovery of the judgment, no proof of the latter defaults was given at the trial. Doubtless this was because at that stage of development in the litigation of this question the materiality of such a comparison of dates had occurred to no one; and proof of one default at any time after the origination of the debt was deemed sufficient. That such proof had not been given was first noticed in the Court of Appeals; but was not made the foundation of any argument or conclusion. Addressing itself to the propositions elaborately sustained in the Court below, the Court of Appeals in an unanimous judgment delivered by PECKHAM, J., said, among other things:

"It will be seen that this is a highly penal act, ex-
"tremely rigorous in its provisions.

"It is absolute that the trustees shall be liable for
"all the debts of the company if the report be not
"made, no matter by whose fault. If one of the trus-
"tees did all in his power to have it made, yet if the
"president or a sufficient number of his co-trustees to
"constitute a majority decline to sign it; or if the
"president and secretary decline to verify it by oath,
"the faithful trustee seems to be absolutely liable as
"well as those who refused to do their duty.

"Various questions arose at the trial and have been
"discussed here, but a decision of this one *as to the*
"*effect upon these parties of this judgment against the*
"*company* will dispose of the case.

"The statute declares this liability to be for all of
"the debts of the company then existing. It may be
"urged with some plausibility that this judgment was
"certainly a debt of the company, and for that the de-
"fendants were therefore liable. * * *

"The answer, I think, is that as against these de-
"fendants that judgment did not legally exist, as they
"were neither parties nor privies to it."

After examining the question of privity and finding that in the case of *stockholders* there is privity which justifies holding them bound as *principal debtors* or sureties by the measure of the judgment, but *no such privity* in the case of the *trustee* who is a mere representative or *agent*, the Court goes on to say:

"In the case at bar the defendants are strictly
"neither principal debtors with the company nor sure-
"ties. The statute simply imposes a penalty upon
"them for the omission of a prescribed duty; it com-
"pels them to pay the debt of another."

Alluding to the fact that in some cases the trustees might have full notice of the original causes of action, the learned Judge says:

"I do not mean to say that the defendants might "not have been bound by that judgment by their con- "duct in the actual defense of that suit against the "corporation."

"But if they have notice as trustees there may be "reasons for not defending, which would not exist if the "suits were against them personally. The company "may be without property, the debt as claimed may be "just and they suppose that the plaintiff will take "judgment for that sum, there is reason for supposing "that the claim in this case was for less than the judg- "ment recovered against the company.

"*There is no hardship in requiring the plaintiff to 'prove his case against these defendants.* If he has "sold the company goods, loaned it money, or rend- "ered it service, it is easily proved in this action. *It "seems to me that connivance and fraud are prevented "by requiring such proof.*"

Having thus far treated the judgment as constitut- ing the cause of action or an element therein, and hav- ing said, as above quoted, that a decision of the question "as to *the effect upon these parties of this judgment* against "the company will dispose of the case," the learned Judge takes up the line of argument which treats the the judgment *as evidence* of a debt rather than as con- stituting the debt, and says:

"Nor is the judgment *prima facie* evidence of the "debt as against these defendants. There are many "loose expressions to the contrary in the cases. * * * "There is no ground whatever for holding this "judgment binding upon these defendants, except up- "on the principle of *res adjudicata*. It is a judgment, "and there is no element about a judgment of a *prima "facie* character. * * * That is the inseparable "character and nature of a judgment; it binds all par- "ties and privies whom it binds at all upon the ground "that that matter has been judicially examined by a

"competent tribunal and its judgment pronounced "thereon."

Finally, he adds: "The question involved in this "case is not free from doubt or difficulty. It is not "decided in this Court, although the principles in- "volved, I think, have been. * * * I think the "principles of the law are better sustained by holding "this judgment not evidence against these defendants; "that they are neither parties nor privies to it, *and* "*that they should not be bound by it;* that for this as "for other claims they should be personally served "with process and given an opportunity of try- "ing THE QUESTION OF DEBT."

It will be seen by the closing words that the Court of Appeals, in construing this statute, assumed that the term "debt" has a specific sense different from that employed by text writers in making a scientific classification of obligations.

2. Esmond vs. Bullard, 16 Hun, 65, was the case of an injury to property in 1864. A judgment against the company was obtained in 1867. "The company "failed to file an annual report, &c., in 1866, and *ever* "*since and down to the commencement of this action*, "has failed to make out any report as to the statute in "such case expressly required" (p. 65).

Under this condition of the company's affairs, suit was brought in 1875 to enforce payment of the judgment obtained in 1867 by the defendants as trustees. After hearing proofs, the case was decided in favor of defendants on various points of which the first, and that on which the subsequent affirmance in the General Term was based, is stated as follows:

(1.) "That the judgment in favor of Losee (plain- "tiff's testator) creating the debt against the corpora- "tion, was not sufficient to found a claim upon, in "favor of the creditor against the trustees, under the

"statute in question, but that the action *must be* "*founded upon the original claim*, and that in this case "being for *damages occasioned by a tort* and not arising "upon contract, the same did *not constitute a debt* con-"tracted, as the statute requires."

The General Term, in an unanimous opinion delivered by LEARNED, J., said:

"We think that the decisions of the Court of Ap-"peals have settled the questions presented in favor of "the defendant. It is undoubtedly true, as urged by "the plaintiff, that a judgment is a contract of the "highest kind (Taylor vs. Root, 4 Keyes, 344). So "if the corporation, in consideration of the alleged "damages, had given to the plaintiff's testator a note, "that note would have been a contract. But the case "of Miller vs. White, 50 N. Y., 137, was an action "against trustees under this act. At the Circuit the "Court held the judgment roll against the corporation "conclusive evidence against the trustees. The Court "of Appeals reversed the judgment, and the opinion "declares that the judgment roll was not even *prima* "*facie* evidence against them. As the case was sent "back for a new trial, and as all the Judges concurred, "we must understand that this remark was not *obiter*, "but was laid down for the guidance of the Court be-"low. In Whitney Arms Co. vs. Barlow, 63 N. Y., 62, "it was again stated: 'The facts upon which the debt "'is founded must be proved. The naked admissions "'of the corporation, or judgment against the corpora-"'tion, are not evidence against the testator.' Again: "'When facts are proved which would establish the "'existence of a debt against the corporation, the lia-"'bility of the trustees follows upon the proof of the "'other facts,'" &c.

"In the present case the proof is that a boiler, op-"erated by the corporation, exploded in February, "1864, and injured the plaintiff's property; and that

" the plaintiff afterwards, in April, 1867, recovered a " judgment against the corporation for the damages. " The plaintiffs then did not prove, in the present ac- " tion, the amount of their damages, or that the explo- " sion was due to the negligence of the corporation; " and if the judgment is not evidence against these " trustees, then there was no proof even of a liability " on the part of the corporation. But, again, the " statute says, 'that the trustees in certain cases shall " 'be liable for all the debts of the company then ex- " 'isting, and for all that shall be contracted,' etc. " (Laws, 1848, Chap. 40, § 12). A liability for a tort is " not a *debt* under the statute which is to be construed " strictly. It is not contracted, for it does not grow " out of contract. The cases in other States cited to " support the contrary view were actions on contracts " (Mill Dam vs. Hovey, 21 Pick., 455; Haynes vs. " Brown, 36 N. H., 545). The whole object of the " statute is to protect persons voluntarily dealing with " the corporation and trusting its credit, not to protect " those injured by a mere tort."

It will be seen on examination of the report in 16 Hun that no suggestion was before the Court, or apparently in the minds of any one at that time, that the corporation was abandoned in 1875 in such a sense as to excuse annual reports subsequent to that year. That this point was urged later in the Court of Appeals successfully does not impair the value of Esmond vs. Bullard as [in the Supreme Court] a case on all fours with the present, even to the circumstance that a default had occurred subsequently to the date of the judgment, and while, therefore, it was a "debt existing" of the corporation, precisely as in this case.

4. In McHarg vs. Eastman (35 How. Pr. Rp., 205), the complaint alleged that the defendant was one of the trustees of the Washington Medallion Pen Company, &c.; that said company purchased machinery and gave

their promissory note therefor; that the note being unpaid, judgment was recovered thereon, and that the company had not within twenty days from the first of January of any year since its organization made and published a report, &c. The debt was contracted on the 3d of April, 1863; the judgment was recovered October 24, 1863; and the omission to file a report on account of which the trustee was sued occurred within twenty days from the first day of January, 1864 (p. 208).

We have here, therefore, facts precisely like those in the case at the bar of this Court, except that McHarg vs. Eastman was a case arising *ex contractu*.

MONELL, J., in delivering the unanimous judgment of the Court, consisting of ROBERTSON, MONELL and GARVIN, JJ., and before the decision of Miller vs. White (50 N. Y.), anticipated the reasoning of that case and said

"The penalty imposed is the debt contracted by the "corporation" (page 206).

"Although the recovery of a judgment against the "corporation extinguishes the debt as to it, I do not "see that such a recovery effects the penal liability of "a trustee. A judgment is a debt, and the extinguish-"ment of the simple contract debt and its merger into "the higher debt does not in terms nor by implication "discharge the liability of a trustee. It may operate "as a bar to another action against the corporation, "but it lays no foundation for an action against a trus-"tee. Such latter action is not for the recovery of the "debt, *but to recover a penalty, the measure of which is "regulated by the debt.*

* * * * * *

"Upon the construction I have given the statute, "the 'debt' for which the trustee may become liable "is the *original debt* contracted by the corporation, "and not the judgment which the creditor may have "recovered against the corporation. The recovery of "such judgment was, therefore, unnecessary and the

"allegation in the complaint in respect to it entirely "immaterial."

* * * * * *

"For the reasons assigned * * * the facts stated in the complaint are not sufficient to constitute a cause of action; and * * * therefore the demurrer should have been sustained."

4. Miller vs. White, 4 Hun, 62, was the continuation of proceedings in this case after the new trial ordered in 50 N. Y. At the new trial the complaint was dismissed, and, upon appeal, the General Term used the following language:

"The complaint seems to have been sufficient in all "respects, except that relating to the nature of the "plaintiff's demand. As to that, it was framed on the "mistaken theory that the recovery of a judgment "against the corporation was necessary before an "action could be maintained against the trustees. "And for that reason the usual allegations describing "the demand sued for were probably omitted. Both "parties appear to have been involved in the same "mistake, as to the necessity of a preceding recovery "against the corperation. And the defendant, there-"fore, fully answered the defective complaint, and in "doing so described what the plaintiff had omitted to "state, the consideration out of which the demand was "supposed to have arisen. Upon the issue so framed "the action was tried and determined in favor of the "plaintiff, and a new trial ordered on the reversal of "the judgment by the Court of Appeals. After so "much litigation in the case, there can be no reason "for believing that the defendants can be misled as to "the nature or description of the claim made against "them. Their protection, therefore, does not require "a dismissal of the complaint at the present stage of "the proceeding.

"The plaintiff averred that the company was in-

"debted unto him on the 1st of June, 1865; and then "stated that he recovered a judgment against the com- "pany on the debt on the 27th of June, 1866, for the "sum of $24,734.62, which remained wholly unpaid. "This, though not a direct, was an argumentative "allegation that the plaintiff had such a demand "against the company on the 1st of June, 1865. Stand- "ing by itself, the cause of action was not probably "*sufficiently stated to be good against a demurrer.* "But the defendants, by their answer, alleged that the "judgment was founded upon a claim for work, labor, "and services, done and performed by the plaintiff in "procuring contracts for supplies from the Govern- "ment of the United States, and then proceeded to dis- "close facts rendering the contracts void as against "public policy. The averment that the pretended "debt accrued for work and labor performed by the "plaintiff, supplied the *substantial defect* existing in "the complaint; and, together with the defenses pre- "sented against its recovery, created a substantial issue "of fact for trial in the action."

4. In Reed vs. Keese, 37 Superior Court Reps., 269, the General Term of the Superior Court of New York City (Justice Van Vorst participating) decided that in an action to enforce payment of a debt for goods by a trustee, evidence of a judgment obtained against the company was properly rejected as immaterial on the authority of Miller vs. White, but without any reference to the respective dates of the judgment and the default. The Court say:

"The complaint alleges both the original indebted- "ness and the recovery of the judgment prior to the "the decision in Miller vs. White, 50 N. Y., 137, which "was published after the commencement of this action, "the question whether an intermediate judgment against "the corporation could be used as evidence, and with

"what effect, was unsettled both in this Court and the "other Courts of the State.

"The above case has settled, for the first time, I be- "lieve, that such a judgment was neither *prima facie* "nor conclusive evidence of a debt in an action against "the trustees to enforce their individual liability; and "hence evidence of the judgment against the corpora- "tion seems to have been excluded on the trial of "this case."

5. In Weymouth vs. Dimock, 41 How. Pr. Rep., p. 92, the company was indebted for services on the 7th of January, 1869. On the 11th of March, 1869, judgment was recovered. The company did not file any report in 1870 or 1871. On a motion to strike out the allegations of the complaint concerning the judgment, the Court ordered them stricken out as irrelevant.

This decision of a Judge of the Supreme Court, in the same branch in which Mr. Justice Van Vorst was temporarily sitting when in Lewis vs. Armstrong he decided the same question on precisely the same facts the other way, should have been cited to him. Had this been done he would not only have been better instructed as to the law in that Court, but in the opinion would have found *McHarg vs. Eastman* cited from his own Court as authority.

6. In Rorke vs. Thomas, 56 N. Y., 559, the Court of Appeals said in such a case:

"A judgment against the company was neither "necessary to the liability of these defendants *nor* "*were they bound by it.*"

7. In Whitney Arms Co. vs. Barlow, 63 N. Y., 72, the same Court said:

"The debt must be proved by *evidence competent* "*against the defendants.* The *facts* on which the debt "is founded must be proved. The naked admissions "of the corporation, or judgment as against the cor-

"poration, are not evidence against the trustees. They "are *res inter alios acta*."

8. Cases of *stockholders* are clearly distinguishable from those of trustees (Hastings vs. Drew, 76 N. Y., 15); but the preponderance is to the effect that in New York a judgment against a corporation is not evidence against a *stockholder* in a suit to enforce his individual liability.

Moss vs. McCullough, 5 Hill, 131.
Belmont vs. Coleman, 21 N. Y., 96.
Strong vs. Wheaton, 38 Barb., 616.
McMahon vs. Macy, 51 N. Y., 162.
Witherhead vs. Allen, 3 Keyes, 562.

If the trustee who is to bear the penalty is denied the privilege to inquire into the original debt, then that "connivance and fraud," apprehended by the Court in Miller vs. White (50 N. Y., p. 143), becomes not only possible but easy. Let the following be supposed by way of example, to be facts of this case: The Union Petroleum Company being the owner of lands in Pennsylvania, became involved in a dispute about land boundaries, and finally brought ejectment against the plaintiff's testator and *succeeded in establishing its title*. Some time after, when the product of oil on those lands had fallen off and the working had been practically abandoned, a suit was brought in Pennsylvania by plaintiff's testator *for the value of oil taken from those lands*, which had been adjudged to be, not his, but the Company's land. The suit being removed to the Circuit Court upon a petition signed by the defendant Curtis, one of the trustees at that time, was heard of no more until this judgment was reported, together with information that there was no chance to be rid of the verdict, and no legal grounds on which to sustain a writ of error. After that, from 1874 until 1878, nothing more was heard of the matter. Then this suit was brought, not against all the directors,

but against the two *solvent* ones, who, not being the majority, *could not*, while the actual majority *would not*, make the proper annual report in 1875. Connivance and fraud might here find a perfect field of operation.

Such a situation being *possible* under the law, and therefore intended, can it *also be possible* that the law makers intended a meaning in the word "debts" which would shut the innocent trustee in such a case out from the chance to learn whether indeed any oil of the original plaintiff was taken? Whether he ever had any oils. And by what mystery he gains a judgment for oil taken by the company from its own lands?

In respect to such a possibility, the Court of Appeals said in Miller vs. White, 50 N. Y. p. 143: "There is no hard-"ship in requiring a party to prove his case against "these defendants. If he has sold the company goods "or rendered it service, it is easily proved in this ac-"tion. It seems to me that connivance and fraud are "prevented by requiring such proof."

It will be seen, at folios 9 and 10, Transcript of Record, that this suit was begun on the 11th of January, 1878, with the intention to assert the original claim; that on motion being made (fols. 16, 19) for a bill of particulars, the plaintiff elected not to give it, but to withdraw his complaint and substitute another, relying solely on the technical force of his judgment, as an estoppel to further inquiry.

Counsel for defendants in error feel justified in stating that their demand for a bill of particulars (fols. 16–18) was made in order to elicit the fact that this judgment had been rendered for oils taken from lands at one time claimed by both parties, but awarded to the Union Petroleum Company after trial in ejectment.

Third. The effort is made here to catch these defendants in the drag-net of a definition. Of course, a

"judgment" is scientifically classified among obligations as a "debt." That is what is meant by the law lecturer when he uses the term philosophically. But the practical question here is: What did the Legislature of New York mean by the term *debt* in an enactment by which a man may have to pay it who never contracted it?

1. The interpretation of the word "debts" is incidentally elucidated in a manner valuable for the purposes of this case by STORY, J., in Carver vs. Braintree, 2 Story, 432, 448, as follows:

"The question turns, therefore, upon the meaning of "the words 'debts contracted' in the statute. Do they "mean literally and strictly such debts as are due and "payable in money *ex contractu* * * * or do they ex-"tend to all legal obligations incurred by a corpora-"tion, and which, when fixed by a judgment, or award "or otherwise, are debts of the corporation?

"If the words 'debts contracted' in the statute are "to receive the limited construction, that they are ap-"plicable only to debts in the *strict sense of the term*, "that is, contracts for the payment of money and noth-"ing else, it is obvious that the purposes of the statute, "which, although in some sense it may be deemed "penal, is also in another sense remedial, would be "comparatively of little value. * * * If, on the other "hand, we should construe the statute broadly as a "remedial statute, giving to the words 'debts con-"tracted' a meaning not unusual * * * so that the "phrase * * * in this sense would be equivalent to "* * * liabilities incurred, the statute would attain "all the objects for which it was designed."

These words were made use of by Judge Story in a case where a statute imputed to stockholders an original and co-ordinate liability with the corporation of which they were members; and this was clearly a remedial statute. Indeed, it is difficult to see how it is to be regarded as a penal statute at all. It changed

the common law simply by making incorporated partners liable for debts of their corporation as unincorporated partners are. The value of Judge Story's distinction between definitions, therefore, remains for the purposes of this case, while the principles by which he applied the broader definition to that case in the light of a remedial statute will be seen by an examination of authorities in New York to have been declared inapplicable to cases arising under the statute in question here.

2. The difference between these two kinds of liability is distinctly stated in Stephens vs. Fox, 83 N. Y., 313–317. RAPALLO, J., delivering the unanimous judgment of the Court, said (page 316):

"This action is based upon section 10 of the general "railroad act * * * which provides that 'each "stockholder shall be individually liable to the credi- "tors of such company to an amount equal to the "amount unpaid on the stock held by him,' &c., &c.

"The only material question brought up on this ap- "peal is whether, in an action against a stockholder "* * * a judgment recovered against the company "is competent evidence of the plaintiff's status as a "creditor of the company, and of the amount due "him.

"The effect of section 10 is not to impose any pen- "alty on the stockholder, or any original liability, but "simply to confer upon the creditor of the corporation "the right to pursue, for the satisfaction of his claim, "the indebtedness of the stockholder to the corpora- "tion, &c., &c. * * *"

"The cases of Miller vs. White (50 N. Y. 137), and "Mahon vs. Macy (51 *Id.*, 155) depend upon an en- "tirely different principle. In those cases the defend- "ant was not pursued as a debtor to the corporation, "or for any pre-existing liability of his own, but upon "an original liability created by the statute, *and it was "not in the power of the corporation to admit away his*

"*case or to suffer a recovery which should be binding*
"*upon him and create, as against him, a liability to which*
"*he was not previously subject.* * * *" (p. 317.)

See also

Hastings vs. Drew, 76 N. Y., 15.

Fourth. From the foregoing cases, considered together and compared, the following propositions appear to be clearly demonstrable:

That a judgment against the company under this act does not *ex proprio vigore* bind a trustee.

See Miller vs. White, and Stephens vs. Fox.

That this is the same whether the judgment be in existence at the time of the trustee's default, or only afterward.

See the facts in McHarg vs. Eastman, and Weymouth vs. Dimock.

That the judgment is not receivable as evidence of the principal debt, because the company has no power to admit away the case of the trustee.

See Stephens vs. Fox.

That the material question in a suit against a trustee is: What was the original debt? and in determining this question, obligations arising from wrongs are not debts for which a trustee can be made liable under the laws of New York.

See Esmond vs. Bullard; Heacock vs. Sherman, 14 Wend., 59–60.
Cable vs. McCune, 26 Mo., 371.
Bohn vs. Brown, 33 Mich., 257.

The suggestion has been made that it is erroneous to treat this judgment otherwise than as *evidence* of the debt; and from that it is said to result logically that

the question is one of evidence and as such, is not determinable upon the State law.

If we are to speak of the judgment as evidence, why is it pleaded? If it is evidence of a debt, of what debt is it evidence? No other debt is alleged or relied upon. On the contrary, the judgment is pleaded as the plaintiff's cause of action; its existence as pleaded is admitted by the demurrer, and the question is, whether being taken as authentic, it avails the plaintiff anything.

Fifth. The allegation that the action in which judgment was recovered was removed to the Circuit Court on the petition of the company, verified by the defendant Curtis, does not render the judgment more effectual against him.

1. In his opinion, in Miller vs. White, Judge PECKHAM says: "I do not mean to say that the "defendants might not have been bound by that "judgment by their conduct in the actual defense "of that suit against the corporation."

Whatever force this suggestion has must be in subordination to the distinct ground on which the decision rests, viz., that a judgment binds only parties and privies. Giving the intimation its utmost effect, in order that the judgment may bind the defendant Curtis, it must appear that he so conducted himself as to make the defense his own. He must at least have had the "right to "appear and control the action, and to appeal "from the judgment, although not a party to the "record."

1 Greenleaf on Evidence, Vol. I, § 523.
Castle vs. Noyes, 14 N. Y., 332.

2. But the allegation here shows neither any control over the defense, actual or possible, nor

any personal participation in it. Had there been a general averment of interposition in the defense, a different question would be presented, but this allegation admits of the introduction in evidence of nothing save the naked fact of the verification of the petition.

This was a mere ministerial act, which, as an officer of the company he was bound to perform in its behalf.

3. The answer made by Judge Peckham to his own suggestion very effectually disposes of it:

"But if they have a notice as trustees, there "may be reason for not defending, which would "not exist if the suit were against them personally. The company may be without property, "the debt as claimed may be just, and they suppose that the plaintiff will take judgment only "for that sum; there is no reason for supposing "that the claim in this case was for less than the "judgment recovered against the company.

"There is no hardship in requiring a party to "prove his case against these defendants. If he "has sold the company goods, loaned it money, "or rendered it service, it is easily proved in this "action. It seems to me that connivance and "fraud are prevented by requiring such proof."

50 N. Y., 143.

Sixth. The complaint is insufficient for other reasons in addition to the special ground on which the Circuit Court sustained this demurrer.

1. The complaint fails to state that the company was carrying on business in January, 1875. The statute does not require any report, and imposes no penalty, unless this is the fact.

Bruce vs. Platt, 80 N. Y., 388–389.

2. The complaint fails to show any joint liability of these three defendants. The statutory liability is imposed on "all the trustees jointly and severally." This action depends on the joint liability of all the trustees of the company. There is no allegation that the three defendants named and joined as defendants constituted the entire number of trustees. The act authorizes any number of trustees, not more than thirteen nor less than three. The complaint states that the defendants "were trustees" of the company, but not that they were *all* the trustees.

3. The allegation of the default is insufficient. It is made in two forms. First, in the conjunctive, that the company "did not within twenty days from the 1st day of January, 1875, make *and* publish a report, etc." Second, in the alternative, "nor have they made, published, signed, verified, or filed any *such* report whatsoever, *as by law required*, but have wholly failed so to do."

Transcript, fol. 24.

(1) It has been finally settled that no penalty can be recovered for not making *and* publishing the report within the twenty days. If it is *made* within the twenty days, it may be published in a reasonable time afterwards without incurring the penalty.

Cameron vs. Seaman, 69 N. Y., 402.

In that case the Court say: "The question is, "must the report be filed and *published* within "twenty days from the 1st of January? * * * "We are of opinion that the limitation of twenty "days does *not* apply to the acts of filing and "*publication*." 69 N. Y., 402–3.

(2) The allegation of the default in the alternative form is equally bad. It is a mere con-

clusion of law made by the pleader from facts not stated. The allegation is not that, being required by law to make, publish, &c., a report, the trustees have done neither; but it is alleged that *such* report, *as by law required*, was not made or published, &c. The complaint would be proved by producing a report which, in the opinion of the Court, would be such a one as the law requires, but which this pleader deems not to be such.

O'Neill vs. Brindle, 9 Queen's Bench, 582, 592 (58 Eng. Com. Law R.) is in point. In that case a plea was adjudged insufficient, "because, "though the plea avers that the company was "*such a one as required* to be registered under "the act, it *does not show why*."

Seventh. The demurrer is sustainable upon the ground that section 12 of the Act of 1875 above cited, is a new enactment, passed and taking effect after the happening of the alleged default and the accruing of the alleged penalty, and *repealing the former law under which that penalty is claimed to have been incurred.*

The recent case of The Victory Webb Printing, &c., Co. vs. Beecher (26 Hun, 50) has, since the preparation of the foregoing points, been affirmed by the Court of Appeals in an opinion not yet published, but a copy of which is printed below.

The facts of the case were like the facts in this case in all respects material to the point now under consideration.

The syllabus in 26 Hun correctly states the case:

"The trustees of manufacturing corporations whose "certificate of incorporation was filed October 6, 1874, "failed to file the report required by section 12 of Chap. "40 of 1848, in January, 1875. On June 7, 1875, Chap. "510 of the laws of that year took effect, whereby the

"said 12th section was so amended as to require that "every such company should make a report 'within "'twenty days from the first day of January if a year "'from the time of the filing of the certificate of incor-"'poration shall then have expired, and, if so long a "'time shall not have expired, then within twenty days "'from the first day of January in each year after the "'expiration of a year from the time of filing such cer-"'tificate.'"

In deciding the case, the General Term of the Supreme Court, by DAVIS, P. J., said:

"The certificate in this case was filed October 6, "1874. Under the section as it then stood the certifi-"cate (that is, the report of the company's affairs) "should have been filed within twenty days after the "first day of January, 1875. The default in doing so "is the ground of the liability of the trustees "averred by the complaint. But, a short time "afterwards, the Legislature amended the act in "such a manner that the certificate was not required "to be filed within twenty days after the first day of "January, 1876. No default in so filing it is averred. "The action was commenced in 1878 for causes of ac-"tion alleged to have accrued against the company in "1875. The amending Act of 1875 contained no sav-"ing clause, except of actions pending at the time of "its taking effect, which was June 7th, 1875. The "plaintiffs' causes of action" (that is the debts) "had "not then wholly accrued and no action therefore was "pending. The question is, can the plaintiffs main-"tain this action under the provision of the general "law * * * *" (p. 51).

"The general rule is, that a penalty given by statute "cannot be recovered after its repeal although in-"curred before, unless the repealing act reserves the "right of action" (p. 52).

After discussing another ground of demurrer the opinion concludes:

"On both of these grounds we think the plaintiffs fail to show a right to enforce the statutory penalties demanded by the complaint" (p. 53).

The opinion of the Court of Appeals, handed down Dec. 23, 1884, is as follows:

"EARL, J.:

"The 12th section of the Act of 1848 was repealed "and superseded by the Act, Chap. 510, of the Laws "of 1875 (Knox vs. Baldwin, 80 N. Y., 610). This "action was commenced subsequently to the repeal to "enforce a penalty under that section (Merchants' Bank "vs. Bliss, 35 N. Y., 412; Jones vs. Barlow, 62 N. Y., "262; Whitney Arms Co. vs. Barlow, 63 N. Y., 62; "Wyles vs. Suydam, 64 N. Y., 173; Bruce vs. Platt, "80 N. Y., 379; Easterly vs. Barber, 65 N. Y., 252; "Veeder vs. Baker, 83 N. Y., 156; Pier vs. George, 86 "N. Y., 613; Roach vs. Duckworth, 95 N. Y., 391; "Stokes vs. Stickney, 96 N. Y., 323). *The right of "action therefore fell with the repeal* (Norris vs. Crocker, "13 How. U. S., 429; Butler vs. Palmer, 1 Hill, 324-"330; Curtis vs. Leavitt, 15 N. Y., 9, 229; Sturgis vs. "Spofford, 45 N. Y., 446-452) and the judgment "should, upon that ground, be affirmed with costs."

"Held, that the Act of 1875 repealed the former "statute and relieved the trustees from the liability "for the debts of the company, imposed upon them by "the former act because of their failure to file the re-"port."

Eighth. There was no error in the judgment and the writ should be dismissed with costs.

Should the Court be of the contrary opinion the record should be remitted to the Circuit Court with instructions to give judgment on the demurrers against

the defendants with leave to withdraw their demurrers and answer the complaint.

Hitchcock vs. Galveston, 3 Woods, 271;
96 U. S., 353; U. S. Rev. Stat., § 701;
4 Cranch, 433; 10 Wheaton, 449.

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